2009

Teresa Guss v. Cheryl, Inc. : Brief of Appellant

Utah Court of Appeals

J. Angus Edwards; Jessica P. Wilde; Jones, Waldo, Holbrook & McDonough; Counsel for Appellant.
William R. Rawlings; Travis B. Alkire; Law Offices of William R. Rawlings; Counsel for Appellee.

IN THE UTAH COURT OF APPEALS

TERESA GUSS,	:	
	:	
Plaintiff/Appellee,	:	Case No. 20090592
	:	
vs.	:	District Court Case No. 060903837
	:	
CHERYL, INC.,	:	
	:	
Defendant/Appellant.	:	
	:	

BRIEF OF APPELLANT
(ORAL ARGUMENT REQUESTED)

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY, STATE OF UTAH, HONORABLE L.A. DEVER

J. Angus Edwards (USB #4563)
Jessica P. Wilde (USB #11801)
JONES WALDO HOLBROOK & McDONOUGH
170 South Main Street, Suite 1500
Salt Lake City, Utah 84101
Telephone: (801) 521-3200

Counsel for Defendant/Appellant

William R. Rawlings (USB #6784)
Travis B. Alkire (USB #11024)
LAW OFFICES OF WILLIAM R. RAWLINGS
11576 South State Street, Suite 401
Draper, Utah 84020
Telephone: (801) 553-0505

Counsel for Plaintiff/Appellee

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11576 South State Street, Suite 401
Draper, Utah 84020
Telephone: (801) 553-0505

Counsel for Plaintiff/Appellee

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78A-4-103(2)(j), because this appeal has been transferred to this Court from the Utah Supreme Court, pursuant to Utah Code Ann. § 78A-3-102(4).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The issue on appeal is whether the district court erred in denying *Cheryl, Inc.'s Motion for Revision of the Decision Denying Summary Judgment.* The standard of review on summary judgment issues is *de novo. See Innerlight v. Matrix Group, LLC,* 2009 UT 31, ¶ 8, 214 P.3d 854. In the alternative, appellant Cheryl, Inc. submits that the district court entered judgment based on an inconsistent verdict. Therefore, the Court should order a new trial. *See Rasmussen v. Sharapata,* 895 P.2d 391, 396-97 (Utah Ct. App. 1995).

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND RULES

Appellant Cheryl, Inc. believes that interpretation of the following may be determinative of portions of this appeal.

- Rule 54(b), Utah Rules of Civil Procedure
- Rule 56, Utah Rules of Civil Procedure

NATURE OF THE CASE

This is a personal injury case wherein plaintiff/appellee Teresa Guss was injured after receiving cosmetic services from defendant/appellant Cheryl, Inc. (**"Cheryl"**). After Ms. Guss had finished her treatment with Cheryl, Inc., defendant Derek Edvalson (**"Derek"**), the adult son of Cheryl Edvalson (the owner of Cheryl, Inc.), assisted Ms. Guss to her vehicle.

Ms. Edvalson did not assist Ms. Guss into her vehicle, nor did any employee assist Ms. Guss. As Derek assisted Ms. Guss into her vehicle, Ms. Guss sustained injuries. Thereafter Ms. Guss sued Cheryl, Inc. and Derek for negligence.

STATEMENT OF FACTS

Cheryl Edvalson is the owner of defendant Cheryl, which is a twenty-one-year-old skin care business that provides facials and waxing treatments. (Trial Transcript (**"TT"**) 138:2-11; 169:9-15; 172:11-13). Cheryl ran the business out of her home (TT 382:5-8), which is located at 5276 Morning Sky Circle, Salt Lake City, Utah. (TT 145:17-21). During March 2004, Ms. Edvalson, on behalf of Cheryl, employed three individuals – Julie Henrickson, Jill Fuller-Neiber, and Natalie Fuller – on a part-time basis. (TT 138:7-11).

Derek Edvalson is the son of Ms. Edvalson and, during March 2004, he was 21 years old and living at home. (TT 378:25-379:15). At that time, he attended school at Salt Lake Community College. (TT 168:19-22; 381:11-14). Occasionally, his mother would ask him to bring in a heavy box, mow the lawn, shovel the driveway, or something of that nature. (TT 177:20-25). At no time, however, was Derek employed by Cheryl. (TT 177:8-15; 383:3-5).

Ms. Edvalson became acquainted with Ms. Guss when Ms. Guss began receiving facial treatments in 2001. (TT 176:7-12; 82:17-23). Ms. Guss is a paraplegic and is confined to a wheelchair. (Record (**"R."**) 305 ¶ 8; TT 79:18-80:13). When Ms. Guss would come to Cheryl for facial treatments, she would have someone carry her from her car to the inside, because there were steps going into the home. (TT 83:2-84:11). In the beginning, Ms.

Guss's boyfriend or a friend would bring Ms. Guss to Cheryl and carry her in so she could receive her treatment. (TT 83:9-10; 140:7-17). Then, Ms. Guss would call Cheryl upon her arrival, and at Ms. Guss's request, Ms. Edvalson and one of Ms. Edvalson's employees would go out to meet her and carry her inside. (TT 178:10-13). On a few occasions, Derek offered to carry Ms. Guss. (TT 84:12-19; 123:1-7; 383:19-25).

On March 12, 2004, Ms. Edvalson had a movable ramp installed over the stairs on the front of her home. (TT 141:8-12; 143:1-3). Ms. Edvalson had this done, in part, so it would be easier for Ms. Guss to enter and leave the premises. (TT 141:8-25). On that day, Ms. Guss received a facial treatment from Cheryl. (TT 99:10-14).

At the time that Ms. Guss was receiving her facial treatment, Derek came home after he had been at school. (TT 385:14-387:4). As Derek arrived, he saw Ms. Guss (TT 389:3-6) and then he proceeded to eat lunch and watch TV. (TT 389:17-20).

Upon Ms. Edvalson's request to her son that he help Ms. Guss out to her car (TT 151:16-17; 152:9-11; 389:20-25), Derek offered to help Ms. Guss out to her car. (TT 390:3-6). Derek proceeded to help Ms. Guss by holding on to the back of her wheelchair, and by slowly pushing her down the ramp (TT 152:23-24; 390:15-18). When the two of them reached Ms. Guss's car, which was parked in the driveway, Ms. Edvalson opened up the left driver's side door of Ms. Guss's vehicle, a Subaru. (TT 150:4-5; 392:1-7).

At that point, Derek lifted Ms. Guss's wheelchair approximately one-quarter to one-half inch so Ms. Guss could get into the seat of her car. (TT 95:22-24; 392:8-11; 398:5-22). Ms. Guss instructed Derek by saying, "Up, up, up!" (TT 159:3-8; 392:12-13). Ms. Guss

began sliding forward (TT 154:20-24), and although there is somewhat conflicting testimony about what exactly happened next, Derek either grabbed onto the wheels of the wheelchair (TT 165:20-24; 96:8-13) or he reached for Ms. Guss's armpits to support her (TT 155:3-4; 183:20-22). Then Ms. Guss fell and hit her shins and knees on the driveway. (R. 305 ¶ 8; TT 96:14-21; 392:21-393:1).

As a result of Ms. Guss's fall, she sustained injuries. (R. 306 ¶ 10; TT 99-105).

STATEMENT OF THE PROCEEDINGS

On March 6, 2006, Ms. Guss filed a Complaint against Cheryl. (R. 1-6). Then, on January 16, 2007, Ms. Guss filed a First Amended Complaint against Cheryl and Derek for negligence. (R. 36-42). In the First Amended Complaint, Ms. Guss alleged:

> 8. The Plaintiff, confined to a wheelchair as a result of a prior condition, was leaving the premises of the Defendant, Cheryl, Inc., when Defendant Derek Edvalson, ***acting for and on the behalf of Cheryl, Inc.***, attempted to pick up the wheelchair in order to put the Plaintiff in her vehicle. While raising [sic] wheelchair off of the ground, the wheelchair rotated and the Plaintiff was dropped onto the concrete driveway below, sustaining the injuries alleged herein.

(R. 37 ¶ 8) (emphasis added). Ms. Guss's allegation that she was injured when Derek lifted the wheelchair is the only act that Ms. Guss alleges caused her injuries. (*See* R. 36-42).

On March 9, 2007, Cheryl filed a motion for summary judgment (the **"Summary Judgment Motion"**), arguing that it could not be held vicariously liable for Ms. Guss's injuries, because Derek was not an employee of Cheryl. (R. 52-152). On May 21, 2007, the district court held a hearing on Cheryl's Summary Judgment Motion. (R. 925; Hearing Transcript (**"HT"**) 1-11) (a copy of the transcript from the hearing is attached hereto as

Exhibit A). At the hearing, Cheryl argued that the evidence showed that Derek was not an employee of Cheryl, and therefore, Cheryl could not be held liable. (HT 3:18-5:8). Ms. Guss argued that to the contrary, there was an issue of fact concerning whether there was an agency relationship between Cheryl and Derek. (HT 7:14-9:3).

At the conclusion of the hearing, the district court denied Cheryl's Summary Judgment Motion, and stated: "I believe this is a factoral [sic] ***question for the jury to determine whether or not the son is a volunteer*** helping his mother in her business, and therefore the business should be liable or could be liable. I'll therefore deny the motion for summary judgment." (HT 10:11-16; *see* Exhibit A) (emphasis added). Thus, the district court held that whether an agency relationship existed between Cheryl and Derek was a question of fact for the jury to decide.

On April 1, 2008, Ms. Guss filed a Second Amended Complaint. (R. 304-07). The Second Amended Complaint added a cause of action against Derek, but it added no new claims or allegations against Cheryl. (R. 304-07).

A four-day jury trial was held, beginning on March 2, 2009. (R. 810-11; 812A-815; 855). Approximately one week before the trial, Ms. Guss settled her case against Derek. (*See* R. 812-13).

At the trial, the jury was presented with the following factual issues: (1) whether Derek was negligent; and (2) whether Derek was a volunteer or an employee of Cheryl. Ms. Edvalson testified that Derek had never been an employee of Cheryl, nor had he ever provided facial treatments. (TT 177:8-15). Ms. Edvalson testified that occasionally, she

would ask her son to carry in to the house a heavy box or to shovel the driveway. (TT 177:17-25). Furthermore, Derek testified that he had never been an employee of Cheryl, nor had he ever been paid by Ms. Guss to help her up the stairs when Ms. Guss would come for her treatments. (TT 383:3-5; 385:8-10). He testified that he was simply "willing to help people in need." (TT 385:12-13).

After the conclusion of the presentation of witnesses at trial, the district court discussed with counsel each of the jury instructions and the Special Verdict form that he intended to give to the jury. (TT 467:5-471:6; 475:8-477:24). Cheryl had submitted proposed jury instructions and a proposed Special Verdict form approximately one week prior to the trial. (R. 676-749). The Record does not show that Ms. Guss submitted any jury instructions or a Special Verdict form. After the district court discussed with counsel the jury instructions (some of which were submitted by Cheryl (R. 676-749) and the rest of which were added by the district court) and Special Verdict form, the district court asked whether counsel had any objections, and counsel for Ms. Guss did not have any objections. (TT 477:20-21).

After the district court recited the jury instructions to the jury, counsel made their closing arguments. (TT 499-534). In Cheryl's counsel's closing argument, Cheryl said that if the jury found that Derek was a volunteer, then Cheryl could not be held liable. (TT 529:4-13). Ms. Guss's counsel did not object to the statement in the closing argument and the district court did not offer a curative instruction.

On March 12, 2009, the jury rendered its Special Verdict and answered seven Interrogatories in the Special Verdict. (R. 865-67) (a copy of the Special Verdict is attached hereto as Exhibit B). The jury found that Derek was a volunteer in Interrogatory No. 6, which provided as follows:

> Considering all of the evidence in this case, please determine from a preponderance of the evidence your conclusion that defendant, Derek Edvalson, was an employee of Cheryl, Inc., or a volunteer.
>
> Employee _____
> Volunteer __X__

(R. 866-67 ¶ 6). The jury, however, distributed the percentage of negligence among the following:

A.	Defendant, Cheryl, Inc.	42 %
B.	Defendant, Derek Edvalson	20 %
C.	Plaintiff, Teresa Guss	38 %

(R. 866 ¶ 5; *see* Exhibit B).

Subsequently, on March 16, 2009, Cheryl filed a motion for the revision of the decision denying summary judgment, pursuant to Utah Rule of Civil Procedure 54(b)[1] (the **"Rule 54(b) Motion"**). (R. 856-58). In the Rule 54(b) Motion, Cheryl argued that the issue of whether Derek was a volunteer or an employee had been resolved by the jury (R. 861-64),

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[1] In *Trembly v. Mrs. Fields Cookies,* 884 P.2d 1306 (Utah Ct. App. 1994), a copy of which is attached hereto as Exhibit D, this Court stated that "Rule 54(b) of the Utah Rules of Civil Procedure . . . allows a court to change its position with respect to any order or decision before a final judgment has been rendered in the case." *Id.* at 1310 n.2 (citing *Timm v. Dewsnup,* 851 P.2d 1178, 1184-85 (Utah 1993); *Salt Lake City Corp. v. James Constructors,* 761 P.2d 42, 44-45 (Utah Ct. App. 1988)). The Court noted that "a motion under Rule 54(b) is a proper vehicle to ask the court to reconsider its prior denial of a motion for summary judgment." *Id.* at 1311(citing *Timm,* 851 P.2d at 1184-85; *James Constructors,* 761 P.2d at 44 n. 5).

and, because the district court had denied its Summary Judgment Motion solely on the basis that there was a factual issue on this point, the district court should reverse its earlier denial of Cheryl's Summary Judgment Motion. (R. 861-64).

Ms. Guss responded to the Rule 54(b) Motion by arguing, for the first time, that Cheryl was independently negligent. (R. 886-87). In a one-page Minute Entry dated June 1, 2009, the Court denied Cheryl's Rule 54(b) Motion based on the following: "The Jury may have inferred from the evidence and a review of the Verdict Form that liability ***could be*** assessed against CHERYL, INC. independent of the status of Derek Edvalson." (R. 926) (emphasis added) (a copy of the Minute Entry is attached hereto as Exhibit C). Thus, the Court reconciled the inconsistent verdict by surmising that Cheryl's liability ***could be*** based on a theory of independent negligence.

Judgment was ultimately entered against Cheryl on June 17, 2009. (R. 929-31).

After Cheryl filed its Notice of Appeal (R. 940-41), Ms. Guss filed a motion for summary disposition, pursuant to Rule 10(c) of the Utah Rules of Appellate Procedure, arguing that the jury found Cheryl independently negligent, which rendered the vicarious issue "irrelevant and insubstantial." This Court denied Ms. Guss's motion for summary disposition on September 3, 2009.

SUMMARY OF THE ARGUMENT

Ms. Guss brought this lawsuit against Cheryl and Derek, after she sustained injuries when Derek was helping her into her car after she had received a facial treatment from Cheryl. Ms. Guss pleaded a claim for vicarious liability. The district court held a hearing

on Cheryl's Summary Judgment Motion, in which Cheryl argued that Derek was not an employee of Cheryl and therefore, it could not be held vicariously liable for the torts of Derek. The district court denied Cheryl's Summary Judgment Motion on the ground that there existed an issue of fact concerning whether there was an employment relationship between Cheryl and Derek.

After a jury trial, the jury rendered its Special Verdict and found that Derek was *not* an employee of Cheryl, but was merely a volunteer offering to assist Ms. Guss to her car. The jury, however, apportioned fault against Cheryl. As a result, Cheryl filed a Rule 54(b) Motion, arguing that the factual finding that Derek was a volunteer presented a "different light" or "different circumstances," by which the district court should reverse its denial of Cheryl's Summary Judgment Motion. In response to the motion, Ms. Guss argued that the jury found Cheryl independently negligent. The district court did not necessarily agree with Ms. Guss, but stated that the jury, after reviewing the evidence and the Special Verdict form, may have inferred that liability could be assessed against Cheryl. On that basis, the district court denied Cheryl's Rule 54(b) Motion and entered judgment against Cheryl. The district court essentially ignored the jury's finding that Derek was a volunteer, and declined to give it any legal effect.

Cheryl respectfully requests that this Court reverse the district court's denial of Cheryl's 54(b) Motion, or in the alternative, order a new trial, as set forth in greater detail below.

ARGUMENT

I. THE JURY'S FINDING THAT DEREK WAS A VOLUNTEER PRECLUDES MS. GUSS FROM RECOVERING AGAINST CHERYL UNDER THE DOCTRINE OF VICARIOUS LIABILITY

In this lawsuit, Ms. Guss sought recovery against Cheryl on the theory that Cheryl was the employer of Derek (the adult son of the owner of Cheryl), and therefore, Cheryl should be held liable for Derek's negligence. Under the doctrine of vicarious liability, Cheryl can only be held liable if it employed Derek. Because the jury found that Derek was not an employee of Cheryl, but that he was a mere volunteer that offered to help Ms. Guss, Cheryl cannot be held liable for Derek's negligence.

A. Under the Doctrine of Vicarious Liability an Employer Cannot Be Held Liable for a Volunteer's Negligent Acts

It is well-settled law that an employer cannot be held liable for a tortfeasor's negligence unless the tortfeasor is an employee, and the tortfeasor was acting within the scope of employment during the time the tort was committed. *See, e.g., Glover v. Boy Scouts of America,* 923 P.2d 1383, 1385 (Utah 1996) (stating that the elements of vicarious liability are that an employer-employee relationship existed and that the employee was acting within the scope of his employment). Whether an employment relationship exists is often a question of fact, and is determined by factors including compensation, right to control, intent, and context of the business. *See Gourdin v. Sharon's Cultural Educ. Recreational Ass'n,* 845 P.2d 242, 244 (Utah 1992).

B. The Jury's Finding in Interrogatory No. 6 that Derek was a Volunteer Resolved the Factual Issue on Which the District Court Denied Cheryl's Summary Judgment Motion

In Cheryl's Summary Judgment Motion, it argued that because there was no evidence that Derek was an employee of Cheryl, Ms. Guss's claim against Cheryl should be dismissed. Ms. Guss opposed the motion, arguing that whether an agency relationship exists is a question of fact for the jury. The district court agreed with Ms. Guss, and denied the Summary Judgment Motion on the basis that there existed an issue of fact regarding whether Derek was an employee of Cheryl or a volunteer. At the conclusion of the hearing, the district court stated: "I believe this is a factoral [sic] question for the jury to determine whether or not the son is a volunteer helping his mother in her business, and therefore the business should be liable or could be liable."[2] (HT 10:11-16; *see* Exhibit A). The Court therefore denied the Summary Judgment Motion.

The jury returned its Special Verdict, and found that Derek was a volunteer in Interrogatory No. 6, which provided:

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[2] At the May 21, 2007 hearing on Cheryl's Summary Judgment Motion, the Court speculated as to whether Cheryl could be held liable if the jury found that Derek was a gratuitous servant. The Court stated: "Why can't the corporation be liable because the accident, even if he's not employee? Let's say he's just a servant non-paid, a gratuitous servant, so to speak that does things at the request of the corporation and as a result of a request to him something happens and the corporation – why should the corporation be held liable?" (HT 5:9-14).

Ms. Guss, however, did not pursue a claim that Derek was acting as Cheryl's "gratuitous servant." Ms. Guss did not request that the jury be instructed on facts necessary to support the conclusion that Derek was a gratuitous servant. Accordingly, any such claim is waived. *See Gourdin,* 845 P.2d at 244 n. 1 (the "gratuitous servant" document was not addressed on appeal because it was not raised at trial).

> Considering all of the evidence in this case, please determine from a preponderance of the evidence your conclusion that defendant, Derek Edvalson, was an employee of Cheryl, Inc., or a volunteer.
>
> Employee _____
> Volunteer ___X___

(R. 866-67 ¶ 6; *see* Exhibit B). Implicit in Interrogatory No. 6 is that Derek was *not* an employee of Cheryl. The jury's factual finding conclusively determined "whether or not the son is a volunteer helping his mother in her business, and therefore the business should be liable or could be liable." (*See* HT 10:11-16; *see* Exhibit A). The district court, therefore, should have reversed its ruling on Cheryl's Summary Judgment Motion, as set forth below.

C. The District Court Should Have Reversed its Ruling on Cheryl's Summary Judgment Motion, Pursuant to Rule 54(b) of the Utah Rules of Civil Procedure, in Light of the Jury's Finding in Interrogatory No. 6 that Derek was a Volunteer

Rule 54(b) of the Utah Rules of Civil Procedure "allows a court to change its position with respect to any order or decision before a final judgment has been rendered in the case." *Trembly v. Mrs. Fields Cookies,* 884 P.2d 1306, 1310 (Utah Ct. App. 1994) (citing *Timm v. Dewsnup,* 851 P.2d 1178, 1184-85 (Utah 1993)). A copy of the *Trembly* decision is attached hereto as Exhibit D. Rule 54(b) states, in pertinent part, that

> any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . is subject to revision at any time before the entry of judgment adjudicating all the claims and rights and liabilities of all the parties.

Utah R. Civ. P. 54(b). "Thus, a motion under Rule 54(b) is a proper vehicle to ask the court to reconsider its prior denial of a motion for summary judgment." *Trembly,* 884 P.2d at 1311 (citing *Timm,* 851 P.2d at 1184-85).

> The factors a court may consider in reconsidering a prior ruling when
>
> (1) ***the matter is presented in a "different light" or under "different circumstances;"*** (2) there has been a change in the governing law; (3) a party offers new evidence; (4) "manifest injustice" will result if the court does not reconsider the prior ruling: (5) a court needs to correct its own errors; or (6) an issue was inadequately briefed when first contemplated by the court.

Id. at 11 (citing *State v. O'Neil,* 848 P.2d 694, 697 n. 2 (Utah Ct. App. 1993)) (emphasis added). *See also U.P.C., Inc. v. R.O.A. General, Inc.,* 990 P.2d 945, 958-59 (Utah Ct. App. 1999) (same).

The jury's finding that Derek was not an employee of Cheryl, and instead, was a volunteer, as set forth in Interrogatory No. 6 of the Special Verdict, resolved the legal question of whether Cheryl is vicariously liable for Derek's negligence.[3] The district court's earlier denial of Cheryl's Summary Judgment Motion was based on this precise factual question. Thus, after the trial and prior to the entry of judgment, Cheryl filed a Rule 54(b) Motion, arguing that the district court should reverse its decision on Cheryl's Summary Judgment Motion[4] in light of the jury's finding. (*See* R. 856-64; 891-905).

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[3] The jury found that Derek was negligent in Interrogatory No. 3 of the Special Verdict. (R. 866 ¶ 3).

[4] After the May 21, 2007 hearing on Cheryl's Summary Judgment Motion, the Court directed Ms. Guss's counsel to prepare an order. Ms. Guss's counsel did not submit a proposed order denying Cheryl's Summary Judgment Motion. Therefore, Cheryl seeks (continued...)

The jury's answer to Interrogatory No. 6 constituted a "different light" or "different circumstances" within the meaning of *Trembly*. The Summary Judgment Motion was decided based on the evidence of whether or not Derek was an agent or employee of Cheryl and, because there was an issue of fact regarding the foregoing, the motion was denied. After the trial, it was undisputed that there was no employment relationship between Cheryl and Derek.

In the district court's Minute Entry, dated June 1, 2009, by which it denied Cheryl's Rule 54(b) Motion (*see* Exhibit C), it did not address Cheryl's argument that the jury's finding presented a "different light" or "different circumstances" by which to reverse the district court's decision denying the Summary Judgment Motion. Furthermore, the district court never addressed the legal effect of Interrogatory No. 6. The district court's denial of Cheryl's Rule 54(b) Motion effectively renders Interrogatory No. 6 superfluous – having no legal effect whatsoever, which is set forth in greater detail in Part III.

In conclusion, it was error for the district court to deny Cheryl's Rule 54(b) Motion. Cheryl requests that the Court reverse the district court's decision.

II. THE PURPOSE OF THE JURY TRIAL WAS TO RESOLVE THE FACTUAL ISSUE OF WHETHER CHERYL COULD BE HELD VICARIOUSLY LIABLE FOR DEREK'S NEGLIGENCE

Ms. Guss filed this lawsuit against Cheryl in an attempt to hold Cheryl vicariously liable for Derek's negligence. Again, at the hearing on Cheryl's Summary Judgment Motion,

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[4] (...continued)
reversal of the Court's decision, which is referenced in the transcript of the hearing. (*See* HT 10:11-16; *see* Exhibit A).

Cheryl argued that it could not be held vicariously liable for Derek's negligence because the evidence showed that Derek was not an employee of Cheryl. The district court, however, disagreed with Cheryl, and held that there was an issue of fact regarding whether Derek was or was not an employee of Cheryl. On that basis, Ms. Guss's claim against Cheryl was not dismissed, and Ms. Guss's vicarious liability claim against Cheryl proceeded to trial. After the jury found that Derek was not an employee of Cheryl, thus resolving whether Cheryl could be held vicariously liable, the district court erroneously entered judgment against Cheryl on the notion that Cheryl "***could be***" held independently negligent. (*See* R. 926; *see* Exhibit C).

A. The District Court Confirmed that the Sole Issue at Trial Was Whether Derek Was an Employee of Cheryl or a Volunteer

On January 16, 2007, Ms. Guss filed her First Amended Complaint, which alleges that "Derek Edvalson, ***acting for and on behalf of Cheryl, Inc.***," caused injuries to Ms. Guss when he raised her wheelchair off of the ground and she was dropped. (R. 37 ¶ 8) (emphasis added).

Shortly thereafter, Cheryl filed its Summary Judgment Motion, arguing that Ms. Guss's vicarious liability claim against Cheryl must be dismissed because Derek was not an employee of Cheryl. At the hearing on Cheryl's Summary Judgment Motion, Cheryl's counsel stated: "[W]e have moved for summary judgment on the grounds that the plaintiff has a burden to show that Cheryl, Inc. is vicariously liable as the employer and that the evidence is insufficient . . . ." (HT 4:8-11; *see* Exhibit A). Ms. Guss's counsel responded

by arguing that there was evidence that Derek was an employee of Cheryl, based on evidence that he shoveled the sidewalk and that occasionally, he was paid for doing some things. (HT 8:14-22; *see* Exhibit A). The district court was not convinced that the evidence was conclusive that there was no employment relationship between Cheryl and Derek. Accordingly, the district court denied Cheryl's Summary Judgment Motion and stated: "I believe this is a factoral [sic] question for the jury to determine whether or not the son is a volunteer helping his mother in her business, ***and therefore the business should be liable or could be liable.*** I'll therefore deny the motion for summary judgment." (HT 10:11-16; *see* Exhibit C) (emphasis added).

Throughout the course of litigation, Cheryl conducted discovery and prepared for trial in a manner consistent with what the district court had ordered at the hearing on the Summary Judgment Motion.

Approximately one week prior to the trial, Cheryl submitted a Special Verdict form, and included Interrogatory No. 6 regarding whether Derek was an employee of Cheryl. No objection to Interrogatory No. 6 was made (*see* TT 477:20-21). And, Ms. Guss's counsel did not submit a proposed Special Verdict form or a jury instruction, explaining the legal effect of Derek being a volunteer. Similarly, the district court did not include any interrogatory in the Special Verdict form or a jury instruction regarding the effect of Derek being a volunteer.

At the trial, Cheryl's counsel questioned witnesses, including Cheryl Edvalson and Derek, regarding whether Derek was an employee of Cheryl. For example, Cheryl's counsel asked Cheryl Edvalson whether Derek had ever been employed by Cheryl, and whether he

had ever provided facials or skin care services, to which Ms. Edvalson responded negatively. (TT 177:10-16). Cheryl's counsel asked Derek whether he was ever employed by Cheryl, and, he testified that although he would occasionally help out his mother by mowing the lawn and shoveling the front walk, he was never employed by Cheryl. (TT 383:3-15).

Then, during closing arguments, Cheryl's counsel said that if the jury found that Derek was a volunteer, then Cheryl could not be held liable. (TT 529:4-13). Ms. Guss's counsel did not object to the statement, nor did the district court offer a curative instruction.

After the jury deliberated, it returned its Special Verdict, and found in Interrogatory No. 6 that Derek was not an employee of Cheryl. (R. 866-67 ¶ 6).

Then, in response to Cheryl's post-trial Rule 54(b) Motion, Ms. Guss argued, for the first time, and the district court held, that Cheryl "***could be***" held liable for independent negligence. (R. 26) (emphasis added). The district court did not offer any explanation for this conclusory statement. Nor did the district court attempt to address the effect of Interrogatory No. 6.

Thereafter, judgment was entered against Cheryl based on the district court's unsupported and speculative post-verdict allegation that Cheryl *could be* found independently negligent. Most importantly, the district court's entry of judgment based on independent negligence directly contradicted what it had told counsel at the hearing on Cheryl's Summary Judgment Motion – that Ms. Guss's claim against Cheryl was to proceed to trial to resolve whether Cheryl could be held vicariously liable for Derek's negligence.

B. Ms. Guss Did Not Allege that Cheryl was "Independently Negligent" Until After the Jury Reached a Special Verdict

In Ms. Guss's First Amended Complaint, filed January 16, 2007, the only negligent act alleged of is set forth below:

> 8. The Plaintiff, confined to a wheelchair as a result of a prior condition, was leaving the premises of the Defendant, Cheryl, Inc., when Defendant Derek Edvalson, acting for and on the behalf of Cheryl, Inc., attempted to pick up the wheelchair in order to put the Plaintiff in her vehicle. ***While raising [sic] wheelchair off of the ground, the wheelchair rotated and the Plaintiff was dropped onto the concrete driveway below***, sustaining the injuries alleged herein.

(R. 37 ¶ 8) (emphasis added). Ms. Guss's Second Amended Complaint, filed April 1, 2008 – long after the Court ruled on Cheryl's Summary Judgment Motion,[5] added no new claims or allegations against Cheryl. Therefore, the only alleged negligence is that Derek was negligent when he attempted to raise the wheelchair off the ground, which caused Ms. Guss to fall to the concrete driveway, causing injuries. (R. 305 ¶ 8). And, the only allegation against Cheryl is that Derek was "***acting for and on the behalf of Cheryl, Inc.***," an allegation that Cheryl is vicariously liable for Derek's allegedly negligent act. (R. 305 ¶ 8) (emphasis added).

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[5] As set forth above, the issue on Cheryl's Summary Judgment Motion was whether Derek was a volunteer or employee of Cheryl, and based on the foregoing, whether Cheryl could be held vicariously liable for Derek's negligence. This Summary Judgment Motion was denied on May 21, 2007. Ms. Guss had plenty of time between May 2007 and April 2008 (when the Second Amended Complaint was filed) to consider whether to bring an independent negligence claim against Cheryl. Ms. Guss's decision not to was due to the fact that this case was really a claim against Derek, and Ms. Guss was merely attempting to hold Cheryl liable under the doctrine of *respondeat superior*.

Ms. Guss did not allege that Cheryl was independently negligent until after the trial when she responded to Cheryl's Rule 54(b) Motion.[6] (*See* R. 887).

Ms. Guss, in her pleadings and throughout the course of litigation, did not provide Cheryl with any notice that it was entitled to recover against Cheryl on a theory of independent negligence. *See Canfield v. Layton City,* 2005 UT 60, ¶ 14, 122 P.3d 622 (2005) (a plaintiff is required to give a defendant "fair notice of the nature and basis or grounds of the claim") (citing *Williams v. State Farm Ins. Co.,* 656 P.2d 966, 971 (Utah 1982)).[7]

Courts have considered whether a plaintiff had properly provided notice to a defendant of an independent negligence claim (in addition to a claim for vicarious liability), and thus, whether the defendant could be held liable for independent negligence. In *Longnecker v. Loyola University Medical Ctr.,* 891 N.E.2d 954 (Ill. App. Ct. 2008), an action was brought against a surgeon and a hospital for negligence after an unsuccessful heart transplant. *Id.* at 956-57. The jury found, among other things, that the hospital had committed institutional negligence (independent negligence). *Id.* at 956. On appeal, the hospital argued that it could not be held liable for institutional negligence because the plaintiff's complaint only alleged vicarious liability for the surgeon's malpractice. *Id.* at 964. After reviewing the complaint, the Court held that the plaintiff *did* plead sufficient facts to

---

[6] In Ms. Guss's memorandum in opposition to Cheryl's 54(b) Motion, Ms. Guss does not specify any facts on which Cheryl could be held independently negligent. (*See* R. 881-90).

[7] Furthermore, if a claim or defense is not pleaded, it is waived. *See, e.g., Devine v. Cook,* 279 P.2d 1073, 1078-79 (Utah 1955) (it was error for the trial court to instruct the jury on contributory negligence because the defendants did not plead contributory negligence).

put the hospital on notice of this separate theory of liability because the plaintiff alleged that the hospital "failed to properly test, inspect, and diagnose the donor heart, and that both defendants otherwise deviated from the standard of care." *Id.* at 965 (internal citation omitted). *See also Voorhees v. University of Pennsylvania,* 1997 WL 1433733 (Pa. Com. Pl. 1997), 33 Phila. Co. Rptr. 302, 316 (a hospital could be held independently negligent because there was "***specific mention*** [in the complaint] of negligence in the defendants' failure to 'prophylactically treat' the plaintiff"). Unlike the facts pleaded in the complaints in *Longnecker* and *Voorhees,* Ms. Guss wholly failed to plead *any* facts to put Cheryl on notice that it sought relief against Cheryl for independent negligence. Again, the only factual allegation of negligence is that when Derek lifted Ms. Guss's wheelchair, Ms. Guss was dropped and she fell on the concrete driveway. (R. 305 ¶ 8).

In *Busch v. Flangas,* 837 P.2d 438 (Nev. 1992), the Supreme Court of Nevada dealt with a plaintiff that pleaded the opposite of that which Ms. Guss pleaded. In *Busch,* the plaintiff pleaded independent negligence against the defendant, and did not plead vicarious liability. *Id.* at 440. Because the plaintiff "***tardily mention[ed]*** 'the theory of respondeat superior,' but neither the complaint nor the [summary judgment] motion documents support[ed] this kind of claim of liability," the Court held that the plaintiff could not recover under a theory of vicarious liability. *Id.* at 441 n. 1 (emphasis added).

Like the plaintiff in *Busch,* Ms. Guss's post-verdict allegation that Cheryl was independently negligent was tardy. Thus, Cheryl cannot be held liable for independent negligence.

III. THE DENIAL OF THE RULE 54(b) MOTION DEFEATED THE EFFECT OF THE JURY'S FINDING IN INTERROGATORY NO. 6 OF THE SPECIAL VERDICT

Cheryl included Interrogatory No. 6 in its Special Verdict form and Ms. Guss did not object to this interrogatory. (TT 477:20-21). The district court included Interrogatory No. 6 without hesitation. After the jury found that Derek was a volunteer, but also apportioned fault against Cheryl, Cheryl filed its Rule 54(b) Motion, arguing that Ms. Guss's claim against Cheryl should be dismissed.[8] The district court denied Cheryl's Rule 54(b) Motion by stating in a one-page Minute Entry: "The Jury may have inferred from the evidence and a review of the Verdict Form that liability ***could be*** assessed against CHERYL, INC. independent of the status of Derek Edvalson." (R. 926; *see* Exhibit C) (emphasis added). The district court's attempt to explain the legal effect of Interrogatory No. 6 by stating that liability *could be* assessed against Cheryl is wholly inadequate. In order to enter judgment against Cheryl, the district court had to describe the evidence showing that Cheryl *was* independently negligent, consistent with the finding that Derek was a volunteer, not that it *could be.*[9]

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[8] Again, Cheryl argued in its Rule 54(b) Motion that the district court should reverse its denial of Cheryl's Summary Judgment Motion in light of the jury's finding that Derek was a volunteer. (R. 856-64).

[9] In the case of a special verdict, it is the jury's duty to decide the facts of the case. *Dishinger v. Potter,* 2001 UT App 209, ¶ 16, 47 P.3d 76. "The [trial] court then applies the law to the facts as found and renders a verdict." *Id.* (citing *Brigham v. Moon Lake Electric Ass'n,* 470 P.2d 393, 397 (Utah 1970). Thus, neither the jury or district court conclusively found or decided that Cheryl was independently negligent.

More importantly, the district court's denial of Cheryl's Rule 54(b) Motion defeats the legal effect of Interrogatory No. 6. Cheryl was "entitled to have the benefit of the jury's [finding] on issues of fact." *Mel Hardman Productions, Inc. v. Robinson,* 604 P.2d 913, 917 (Utah 1979). *See also Redevelopment Agency of Roy v. Jones,* 743 P.2d 1233, 1235 (Utah Ct. App. 1987) (same). Furthermore, "it [was] not the trial court's prerogative to disregard or nullify [the jury's finding] by making findings of his own." *Id.*

In *First Security Bank of Utah, Nat'l Ass'n v. Ezra C. Lundahl, Inc.,* 454 P.2d 886 (Utah 1969), a copy of which is attached hereto as Exhibit E, the defendants deposited a check with the plaintiff bank, which was dishonored by the bank. *Id.* at 887. When the check was dishonored, the bank charged the check amount against the defendants' account, thus creating a large overdraft. *Id.* After a dispute arose between the parties, the bank sued the defendants, and the defendants argued that the bank bore the loss because the bank (1) did not provide the required notice of the dishonored check; and (2) there was an accord and satisfaction. *Id.* Then, although the "jury answered interrogatories favorable to defendants on the issues of failure to give notice and accord and satisfaction," the trial court rendered judgment for the plaintiff. *Id.*

Specifically, the jury found that the bank was negligent because it failed to notify the defendants within the time prescribed by law that the check was dishonored, and that there was a complete accord and satisfaction. *Id.* at 888. The Supreme Court of Utah stated:

> The difficulty which exists in this case is that, notwithstanding the findings of the jury in favor of defendants as set forth above, which the trial court stated that he 'accepted,' 'approved,' and found 'true and correct,' he nevertheless awarded the plaintiff credit for the amount of the check. This was done on the

> basis of the court's 'further finding' that the defendants knew or should have known of [the drawer's] financial instability and, in addition, that they were kept fully informed of the plaintiff bank's continuing efforts to collect the check.
> The effect of this 'further finding' was actually to contravene the finding made by the jury that the plaintiff bank 'was negligent because it failed to give [the defendants] notice in the time prescribed by law, or a reasonable time, about the [check] not being honored . . . . The same observation is pertinent to the action of the trial court with respect to the issue of accord and satisfaction.

Id. at 889.

The Court explained that "[i]t is recognized that where a case is submitted to the jury on special verdicts, the trial court may make corrections of obvious errors or defects therein . . . ." *Id.* "But when a party has demanded a trial by jury he is entitled to have the jury find the facts, and ***it is not the trial court's prerogative to make findings inconsistent therewith and thereby defeat the effect of the jury's findings***." *Id.* Thus, the Supreme Court reversed the judgment against the defendants. *Id.*

In *Mel Hardman Productions,* 604 P.2d 913, a copy of which is attached hereto as Exhibit F, the plaintiff sued the defendant for breach of contract for failing to deliver a motion picture to plaintiff. *Id.* at 914. The defendant defended on the ground that he did perform the contract by delivering film to the plaintiff, and he also filed a counterclaim for profits that he should have received after the film was sold and distributed by the plaintiff. *Id.* After a trial, the jury returned its answers to interrogatories that were favorable to the defendant – that the defendant did not breach the contract, and that plaintiff had used and distributed the film. *Id.* The trial court, however, concluded that the defendant was not entitled to any residuals or compensation for the distribution of the film. *Id.* at 914-15.

The Supreme Court of Utah stated that "***the trial court decided to disregard the findings of the jury*** and to rule in favor of the plaintiff on the issues in dispute as a matter of law." *Id.* at 916 (emphasis added). The Court cited *Lundahl* by stating that "it is not the trial court's prerogative to disregard or nullify" the findings of the jury. *Id.* at 917. The Court reinstated the jury's finding, which entitled the defendant to recover on his counterclaim. *Id.* at 918.

The district court, after denying Cheryl's Summary Judgment Motion on the sole basis that an issue of fact regarding the employment relationship between Cheryl and Derek, wholly disregarded the jury's finding that Derek was a volunteer. It was not the district court's prerogative to make findings inconsistent with what the jury found in Interrogatory No. 6 and to defeat the legal effect of the jury's finding that Derek was not employed by Cheryl. *See Lundahl,* 454 P.2d at 889.

IV. IN THE EVENT THAT THIS COURT DENIES CHERYL'S REQUEST TO REVERSE THE DISTRICT COURT'S DENIAL OF CHERYL'S RULE 54(b) MOTION, THE COURT SHOULD ORDER A NEW TRIAL

Cheryl argues above, particularly in Part I Section C, that it was error for the district court to deny Cheryl's Rule 54(b) Motion and ignore the jury's finding that Derek was a volunteer. After the jury found that Derek was not an employee of Cheryl, there was no longer a "genuine issue as to any material fact," under Rule 56 of the Utah Rules of Civil Procedure. The factual finding that Derek was not an employee of Cheryl presented the Summary Judgment Motion in a "different light" or "different circumstances" under the

meaning of *Trembly*. *See Trembly,* 884 P.2d at 1311. Thus, Cheryl requests that the Court reverse the district court's denial of Cheryl's Summary Judgment Motion.

Furthermore, this Court should reverse the district court's entry of judgment against Cheryl because it disregarded the jury's finding in Interrogatory No. 6. *See* Part III above; *see Ezra C. Lundahl, Inc.,* 454 P.2d at 889 (the Court reversed the judgment); *Mel Hardman Productions,* 604 P.2d at 918 (the Court reinstated the jury's finding and reversed the judgment).

However, to the extent that this Court finds that the jury reached an inconsistent verdict, the Court should order a new trial. *See, e.g., Rasmussen v. Sharapata,* 895 P.2d 391, 396-97 (Utah Ct. App. 1995) (acknowledging that in the case of an inconsistent verdict, a new trial must be ordered). The jury found that Derek was not an employee of Cheryl, but also apportioned fault against Cheryl. These findings of fact are inconsistent under the doctrine of vicarious liability. *See Moore v. Burton Lumber & Hardware Co.,* 631 P.2d 865, 869 (Utah 1981) ("[A] jury's answers to special interrogatories must, if at all possible, be read harmoniously . . . .").

A trial court cannot "defeat the effect of the jury's findings." *Lundahl,* 454 P. 2d at 889. Furthermore, the Tenth Circuit has stated that "[t]here is no priority of one answer over another . . . ." *Heno v. Sprint/United Management Co.,* 208 F.3d 847, 854 (citing *Freeman v. Chicago Park Dist.,* 189 F.3d 613, 615 (7th Cir. 1999)). The Court should therefore order a new trial because of the inconsistency in the Special Verdict. *See, e.g., Rasmussen,* 895 P.2d at 396-97; *Bonin v. Tour West, Inc.,* 896 F.2d 1260, 1263 (10th Cir. 1990).

CONCLUSION

For all of the foregoing reasons, Cheryl respectfully requests that the Court reverse the district court's denial of *Cheryl, Inc.'s Motion for Revision of the Decision Denying Summary Judgment*, or, in the alternative, order a new trial.

DATED this 21st day of January, 2010.

JONES WALDO HOLBROOK & McDONOUGH

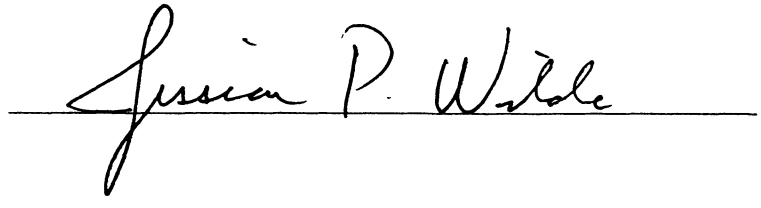
By: Jessica P. Wilde

J. Angus Edwards
Jessica P. Wilde
Attorneys for Defendant/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of January, 2010, I caused to be sent, via hand-delivery, two (2) true and correct copies of the foregoing **BRIEF OF APPELLANT** to the following:

William R. Rawlings
Travis B. Alkire
Law Offices of William R. Rawlings
11576 S. State Street, Suite 401
Draper, Utah 84020



ADDENDUM

Tab A

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE CITY

SALT LAKE COUNTY, STATE OF UTAH

TERESA GUSS,	:	Case No. 060903837 PI
	:	
Plaintiff,	:	
	:	
vs.	:	
	:	
CHERYL, INC., et al.,	:	
	:	
Defendants.	:	With Keyword Index

MOTION FOR SUMMARY JUDGMENT MAY 21, 2007

BEFORE

THE HONORABLE L.A. DEVER

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
1775 East Ellen Way
Sandy, Utah 84092
801-523-1186

APPEARANCES

For the Plaintiff:	WILLIAM R. RAWLINGS Attorney at Law
For the Defendants: For Cheryl, Inc:	J. ANGUS EDWARDS Attorney at Law
For Mr. Edvalson:	KUMEN L. TAYLOR Attorney at Law

INDEX

SALT LAKE CITY, UTAH; MAY 21, 2007

HONORABLE L.A. DEVER, JUDGE PRESIDING

(Transcriber's note: Speaker identification may not be accurate with audio recordings)

P R O C E E D I N G S

THE COURT: Be seated. This is the matter of Guss v. Derek Edvalson, 060903837. Counsel, enter your appearances for the record.

MR. RAWLINGS: Yes, Your Honor, good afternoon, William Rawlings for the plaintiff.

MR. TAYLOR: Good afternoon, my name is Kumen Taylor, I'm for the defendant Derek Edvalson.

MR. EDWARDS: Angus Edwards for the defendant Cheryl, Inc.

THE COURT: This is on for a motion for summary judgment. Cheryl, Inc. is the moving party. You may proceed.

MR. EDWARDS: Thank you, Your Honor. The claims against Cheryl, Inc. are for vicarious liability. Derek Edvalson was added as a defendant somewhat recently and so now we have both the alleged principal and agent as defendants. For a while we only had the purported employer as a defendant. That has been remedied.

Cheryl, Inc. operates an in-home salon in a home that's owned by David and Cheryl Edvalson and the defendant

that was added was their son, Derek Edvalson, back at the time of the accident, March 12, 2004 when he was 21 years old now; now he's 24.

The plaintiff was a customer of the salon for approximately three to four years before the accident and is in a wheelchair. So this accident involves Derek Edvalson, the son, helping the plaintiff into her car after she finished at the in-home salon. And we have moved for summary judgment on the grounds that the plaintiff has a burden to show that Cheryl, Inc. is vicariously liable as the employer and that the evidence is insufficient and we're really only relying on one case in Utah, Glover v. Boy Scouts of America. And the reason we're relying on that case is the court did two things that are important for this case. The court granted summary judgment and as the Court knows in personal injury cases, negligence in particular, summary judgment is not commonly granted. But when it comes to an employment issue, Glover allowed summary judgment to be granted.

The second reason we're relying on Glover is that in that case there was all kinds of evidence of an employment relationship because one of the parties to the employment relationship sought to have an employment relationship declared. And that is categorically different from this case where the employer claims that it was not the employer of Mr. Edvalson at the time he was helping the plaintiff. He was

just the son helping his mom. And the son doesn't say he's an employee at the time he was helping the plaintiff into the car. So those are the really operative facts in this case, the operative law and I think the only thing I want to do for purposes of oral argument is just go through a little bit of Derek Edvalson's deposition testimony because that deposition was taken after my motion for summary judgment was filed. It has been attached to one of the opposing memoranda.

THE COURT: Why can't the corporation be liable because the accident, even if he's not employee? Let's say he's just a servant non-paid, a gratuitous servant, so to speak that does things at the request of the corporation and as a result of a request to him something happens and the corporation - why shouldn't the corporation be liable?

MR. EDWARDS: Well, I would agree with the Court on Mr. Edvalson doesn't have to be paid. He can be a volunteer employee. That's clearly what the Glover case said. So payment, although a factor to be considered, is by no means dispositive. And there's some case law cited in my memoranda and in the other parties' memoranda where the Gordon v. Scara case, I think is how it's pronounced, but for example where a young boy was injured as a volunteer and in exchange for mowing lawns he was admitted into this recreational facility, you know, that he was a voluntary employee was the issue in that case. So the payment isn't the issue, so I would agree

with the Court on that issue. I also agree on the second point the Court is making.

Under the Atkinson v. State Line Casino case that I cited, a pure volunteer, not even an employment relationship, a pure volunteer can also be liable. In other words, we can take it one step farther and perhaps to the court's question we could say Mr. Edvalson wasn't even an employee, wasn't even a volunteer, but as a volunteer helped this woman on behalf of the business, the business can still be liable. And the Atkinson case presents the kind of case where that's probably clearly appropriate. I don't want to go into the facts in too much detail unless the Court has questions about it, but essentially an intoxicated patron of the casino is sort of in the safety of the casino - in fact, I think this was this court's case if I remember right. I won't go into the facts of that case too much, but just to say if you have a person and you make them worse off, even as a pure volunteer, there's no payment, there's no consideration, there's no exchange at all, if you leave them worse off you are subject to liability for purposes of summary judgment where those kinds of issues should be allowed to go to a jury.

THE COURT: So why shouldn't this be allowed to go to the jury then?

MR. EDWARDS: I'd just step back and again and say

in this case unlike the other cases we've been talking about where one of the parties to this relationship, meaning either Derek Edvalson, the son, or Cheryl, Inc. and his mother is the principal, those two parties both say there isn't an employment relationship, there isn't a volunteer relationship on behalf of the business in their deposition testimony. We don't have a similar kind of factual basis like we have in these other cases. That's the distinction. We have an outsider, a patron who is saying there is an employment relationship. The people involved in the relationship are saying no, there was no such relationship. And that's in a nutshell what I'm saying. Thank you.

THE COURT: Mr. Rawlings?

MR. RAWLINGS: Very briefly, Your Honor, I'd just say that, you know, whether he says there's an employment relationship or not, I don't think mere words should be the deciding factor. Certainly the actions of the parties I think are more important. He was - Derek was responding to his mother's request in furtherance of her business. This was a business patron, a business invitee if you will. I don't see how there isn't an issue here as to whether or not there's an agency relationship, some sort of - it's certainly more than volunteer if somebody requests assistance, and this is not the first time. This had happened several other times, so I don't think there's any question that there's an

issue here of whether or not general negligence principles would apply or agency relationship would apply. This isn't somebody who's walking on the street and she says come over here and could you help this lady into her car. This is her son and she says come over here, he came home from school and she's asking to assist. In fact, in the past he's actually picked up my client who has issues of a quadriplegia and carry her from her car into the business and back. In this particular case they were working with a wheelchair. So this seems to be the first time that this had occurred. I don't understand why he was even involved if there is a wheelchair to get her to her car, but that's what happened on this particular day.

I mean, I can go into all the details about the governing board who cleaned off the sidewalk has testified in the deposition he cleaned off the sidewalk of the snow so people could get in and out of the business home residence; that he would get paid once in a while for doing some of these things he would have stock - foot stock that would be delivered and take downstairs, trying to show these kind of little issues that might show some sort of an employment relationship, but frankly I think the issue was so clear I really don't understand why we're here. I think if I ask somebody to do something for my business and that person is not trained, they fail, they do something wrong, then I think

a jury has got a right to determine whether or not I should be held accountable for that. So that I suppose in a nutshell is where I'm coming from. Thank you.

THE COURT: Mr. Taylor?

MR. TAYLOR: Your Honor, I did not file an opposition to the motion for summary judgment because I came in so late. All the discovery was done, the motion was filed three days after I filed an answer. I filed a Rule 56(f) motion and affidavit. I don't know if you want me to argue that or wait on that.

THE COURT: Very well, we can just wait.

MR. TAYLOR: Okay.

THE COURT: Mr. Edwards, anything else you want to say?

MR. EDWARDS: Just two last comments, if I may. I mentioned earlier I was going to comment on two pieces of testimony Derek Edvalson's deposition, I'm just going to briefly do that. The examples where Derek Edvalson himself said that he was an employee. He was asked by Mr. Rawlings the question, you didn't give any specific money - "You didn't get any specific money for assisting Teresa, did you?" He answered no. "Any benefit that was given to you for that specific activity, did you gain anything by that?" His answer was, monentarily, no. And then Mr. Rawlings asked him, "Any other way?" And his answer was, "Just helping out

a fellow human being, trying to do the right thing. I guess it gave me a good feeling to help someone else, if that's a benefit."

And then the other even shorter testimony is when Mr. Edvalson was asked about whether he received instructions about helping the plaintiff into the car, he testified Teresa, the plaintiff - that's the plaintiff - "Teresa always asked me or just told me what to do. It was never - my mom just had her mouth shut." Thank you.

THE COURT: Well, in this matter I believe that the objections made by the defendant are well taken. I believe this is a factoral question for the jury to determine whether or not the son is a volunteer helping his mother in her business, and therefore the business should be liable or could be liable. I'll therefore deny the motion for summary judgment.

MR. RAWLINGS: Thank you, Your Honor.

THE COURT: What's the status of this case now? Do you want to get together and work out a new discovery plan since you have a new party involved?

MR. TAYLOR: That's what I intend to do, Your Honor, is try to get a new discovery plan so I can do some discovery on these issues.

THE COURT: Okay. So you need to get together and work out one. Okay.

MR. EDWARDS: Thank you.

MR. RAWLINGS: Thank you.

MR. TAYLOR: Thank you, Your Honor.

(Whereupon the hearing was concluded)

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CERTIFICATE

I HEREBY CERTIFY that the foregoing transcript in the before mentioned proceeding held before Judge L.A. Dever was transcribed by me from a FTR recording and is a full, true and correct transcription of the requested proceedings as set forth in the preceding pages to the best of my ability.

Signed this 4th day of April, 2009 in Sandy, Utah.

Carolyn Erickson
Certified Shorthand Reporter
Certified Court Transcriber

Tab B

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

TERESA GUSS,	:	**SPECIAL VERDICT**
Plaintiff,	:	**CASE NO. 060903837**
vs.	:	
CHERYL, INC.,	:	**Judge L. A. Dever**
Defendant.	:	

MEMBERS OF THE JURY:

Please answer the following questions from a preponderance of the evidence. If you find the evidence preponderates in favor of the issue presented, answer "Yes." If you find the evidence is so equally balanced that you cannot determine a preponderance of the evidence, or if you find that the evidence preponderates against the issue presented, answer "No." Also, any damages assessed must be proven by a preponderance of the evidence.

1. Considering all of the evidence in this case, do you find from a preponderance of the evidence that the defendant, Cheryl, Inc., was negligent in performing any one or more of the specific acts of negligence alleged by the plaintiff?

ANSWER: Yes ✓ No _____

2. Considering all of the evidence in this case, do you find from a preponderance of the evidence that negligence of the defendant, Cheryl, Inc., was either the sole proximate cause or a contributing proximate cause of the plaintiff's injuries.

ANSWER: Yes ✓ No _____

3. Considering all of the evidence in this case, do you find from a preponderance of the evidence that the defendant, Derek Edvalson was negligent in performing any one or more if the specific acts of negligence alleged by the plaintiff?

ANSWER: Yes ✓ No _____

4. Considering all of the evidence in this case, do you find from a preponderance of the evidence that the defendant, Derek Edvalson, was either the sole proximate cause or a contributing proximate cause of the plaintiff's injuries.

ANSWER: Yes ✓ No _____

5. If you have answered Questions 2 and 4, "yes," then, and only the, answer the following question: Assuming the combined negligence of all parties to total 100%, what percentage of that negligence is attributable to:

A.	Defendant, Cheryl, Inc.	42	%
B.	Defendant, Derek Edvalson	20	%
C.	Plaintiff, Teresa Guss	38	%
	TOTAL	100	%

6. Considering all of the evidence in this case, please determine from a

preponderance of the evidence your conclusion that Defendant, Derek Edvalson, was an employee of Cheryl, Inc., or a volunteer.

Employee _____

Volunteer V

7 If you have answered either or both of questions 2 and 4 "Yes", state the amount of special and general damages, if any, sustained by the plaintiff as a proximate result of the plaintiff's injuries. If neither question was answered "Yes," do not answer this question.

Special Damages:

A. Past Special Damages	$ 135,310.53
B. Future Special Damages	$ 190,000.00
General Damages	$ 55,625.00
TOTAL	$ 380,935.53

DATED this 12th day of ~~February~~ march, 2009.

Foreperson

Tab C

IN THE THIRD JUDICIAL DISTRICT, SALT LAKE COUNTY
STATE OF UTAH

TERESA GUSS, Plaintiff, vs. CHERYL, INC. and DEREK EDVALSON, Defendants.	**MINUTE ENTRY** Case No. 060903837 Judge: L.A. DEVER

The above entitled matter is before the Court on Defendant CHERYL, INC.'s Motion to Renew Motion for Summary Judgment and Objection to the Proposed Judgment submitted by the Plaintiff.

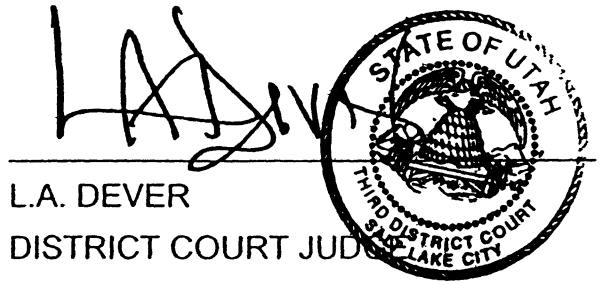
The Court has reviewed the memoranda of the parties. Defendant's Renewed Motion for Summary Judgment is denied. The Jury may have inferred from the evidence and a review of the Verdict Form that liability could be assessed against CHERYL, INC. independent of the status of Derek Edvalson. The Special Verdict Form, signed by the Jury, assessed liability to CHERYL, INC.

Defendant's objections to the costs listed in the Judgment are well taken. The amount of costs is limited to $405.36, as outlined in the Defendant's memorandum.

Plaintiff is directed to prepare a revised Judgment in the amount of $188,813.49.

Dated 28th day of May, 2009.

BY THE COURT:



L.A. DEVER
DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the foregoing Minute Entry dated this 28th day of May, 2009, postage prepaid, to the following:

J. Angus Edwards
JONES WALDO HOLBROOK & McDONOUGH PC
170 South Main Street, Suite 1500
Salt Lake City, UT 84101

William R. Rawlings
LAW OFFICE OF WILLIAM R. RAWLINGS
11576 South State Street, Suite 503
Draper, UT 84020

CLERK OF COURT

STATE OF UTAH
THIRD DISTRICT COURT
SALT LAKE CITY

Tab D

884 P.2d 1306
(Cite as: 884 P.2d 1306)

C

Court of Appeals of Utah.
Joe D. TREMBLY, Plaintiff and Appellant,
v.
MRS. FIELDS COOKIES, Defendant and Appellee.
No. 930635-CA.

Nov. 10, 1994.

Former employee sued former employer for breach of implied-in-fact employment contract, breach of written contract, breach of covenant of good faith and fair dealing, misrepresentation, and intentional infliction of emotional distress. The Third District Court, Summit County, David S. Young, J., after denial of employer's summary judgment motion by previous judge, granted summary judgment for employer, finding that employee's employment was at-will. Employee appealed. The Court of Appeals, Davis, J., held that: (1) judge could reconsider prior denial of summary judgment, and (2) employee failed to prove that he was employed other than at-will.

Affirmed.

West Headnotes

[1] Judgment 228 ⇐345

228 Judgment
228IX Opening or Vacating
228k345 k. Judgments Which May Be Opened or Vacated. Most Cited Cases
Motion for relief from judgment "for any other reason justifying relief" was not available, where party was asking court to reconsider denial of motion for summary judgment, which is not final order or judgment. Rules Civ.Proc., Rule 60(b)(7).

[2] Courts 106 ⇐99(1)

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k99 Previous Decisions in Same Case as Law of the Case
106k99(1) k. In General. Most Cited Cases
In action in which multiple claims or multiple parties are involved, court may change its position with respect to any order or decision before final judgment is rendered. Rules Civ.Proc., Rule 54(b).

[3] Judgment 228 ⇐186

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k186 k. Hearing and Determination. Most Cited Cases
Party's motion for relief from denial of summary judgment motion would be treated as motion for revision of order in action involving multiple claims or multiple parties before entry of final judgment, as substance, not caption of motion is dispositive in determining character of motion. Rules Civ.Proc., Rules 54(b), 60(b)(7).

[4] Judgment 228 ⇐186

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k186 k. Hearing and Determination. Most Cited Cases
Decision to entertain motion for revision of order in action involving multiple claims or multiple parties prior to entry of final judgment is question of law. Rules Civ.Proc., Rule 54(b).

[5] Courts 106 ⇐99(1)

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision

106k99 Previous Decisions in Same Case as Law of the Case
106k99(1) k. In General. Most Cited Cases
Rule which permits court to revise order in action involving multiple claims or multiple parties prior to entry of final judgment allows for possibility of judge changing his or her mind. Rules Civ.Proc., Rule 54(b).

[6] Judgment 228 ⚷186

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k186 k. Hearing and Determination. Most Cited Cases
Motion for revision of order in action involving multiple parties or multiple claims prior to entry of final judgment is proper vehicle to ask court to reconsider prior denial of motion for summary judgment. Rules Civ.Proc., Rule 54(b).

[7] Motions 267 ⚷39

267 Motions
267k39 k. Reargument or Rehearing. Most Cited Cases
Court can consider several factors in determining propriety of reconsidering prior ruling, including but not limited to whether: matter is presented in different light or under different circumstances; there has been change in governing law; party offers new evidence; manifest injustice will result if court does not reconsider prior ruling; court needs to correct its own errors; or issue was inadequately briefed when first contemplated by court.

[8] Judgment 228 ⚷186

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k186 k. Hearing and Determination. Most Cited Cases
Judge relied on proper grounds for reconsidering denial of employer's motion for summary judgment on employee's implied-in-fact contract claim by different judge in same action, where judge believed that cases which were decided after denial of motion warranted reconsideration.

[9] Courts 106 ⚷99(7)

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k99 Previous Decisions in Same Case as Law of the Case
106k99(7) k. Different Courts or Judges, Rulings By. Most Cited Cases
"Law of the case" doctrine, which provides that one district court judge cannot overrule another district court judge of equal authority, has evolved to avoid delays and difficulties that arise when one judge is presented with issue identical to one which has already been passed upon by coordinate judge in same case.

[10] Courts 106 ⚷90(1)

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k90 Decisions of Same Court or Co-Ordinate Court
106k90(1) k. In General. Most Cited Cases
Notwithstanding law of the case doctrine, trial court is not inexorably bound by its own precedents.

[11] Courts 106 ⚷99(1)

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k99 Previous Decisions in Same Case

as Law of the Case
106k99(1) k. In General. Most Cited Cases
Judge is free to change ruling in case involving multiple claims or multiple parties until final decision is formally rendered. Rules Civ.Proc., Rule 54(b).

[12] Courts 106 ⇐99(3)

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k99 Previous Decisions in Same Case as Law of the Case
106k99(3) k. Jurisdiction, Dismissal, Nonsuit, and Summary Judgment, Rulings Relating To. Most Cited Cases
Denial of motion for summary judgment was not final order, and thus law of the case doctrine did not preclude judge from revisiting prior ruling of different judge in same action.

[13] Courts 106 ⇐99(7)

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k99 Previous Decisions in Same Case as Law of the Case
106k99(7) k. Different Courts or Judges, Rulings By. Most Cited Cases
Single judge is entitled to correct any interim order previously made, and even though a location within a judicial district is on a rotating judge calendar, authority of judge who actually decides case on merits to correct previously entered order is undiminished.

[14] Courts 106 ⇐99(7)

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k99 Previous Decisions in Same Case as Law of the Case
106k99(7) k. Different Courts or Judges, Rulings By. Most Cited Cases

Judges 227 ⇐24

227 Judges
227III Rights, Powers, Duties, and Liabilities
227k24 k. Judicial Powers and Functions in General. Most Cited Cases
On rotating calendar, two judges, while different persons, constitute single judicial office for law of the case purposes.

[15] Appeal and Error 30 ⇐949

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k949 k. Allowance of Remedy and Matters of Procedure in General. Most Cited Cases

Motions 267 ⇐39

267 Motions
267k39 k. Reargument or Rehearing. Most Cited Cases
It is within sound discretion of trial court to grant motion for revision of order in case involving multiple claims or multiple parties prior to entry of final judgment, and discretion to do so will not be disturbed on appeal absent abuse of that discretion. Rules Civ.Proc., Rule 54(b).

[16] Judgment 228 ⇐186

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k186 k. Hearing and Determination. Most Cited Cases
Judge did not abuse his discretion, in wrongful termination action, by granting employer's motion for relief, based on cases which were decided after judge who had previously been handling action

denied summary judgment on employee's implied-in-fact contract claim, where one case considered issues similar to those raised in case at bar, and facts in other case were analogous to the facts in case at bar, and in that case the state Supreme Court held that plaintiff's evidence was insufficient to survive motion for summary judgment. Rules Civ.Proc., Rule 54(b).

[17] Appeal and Error 30 ⚿842(1)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k838 Questions Considered
30k842 Review Dependent on Whether Questions Are of Law or of Fact
30k842(1) k. In General. Most Cited Cases
Whether summary judgment was appropriate is question of law and Court of Appeals grants no deference to trial court's decision, but rather, reviews it for correctness.

[18] Appeal and Error 30 ⚿934(1)

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k934 Judgment
30k934(1) k. In General. Most Cited Cases
When reviewing grant of summary judgment, Court of Appeals liberally construes all inferences that may reasonably be drawn from facts in favor of nonmoving party.

[19] Labor and Employment 231H ⚿58

231H Labor and Employment
231HI In General
231Hk58 k. Questions of Law and Fact as to Employment Status. Most Cited Cases
(Formerly 255k43 Master and Servant)
Although existence of implied-in-fact employment contract is normally question of fact left to discretion of jury, court retains power to decide whether, as matter of law, reasonable jury could find that implied contract exists.

[20] Labor and Employment 231H ⚿51

231H Labor and Employment
231HI In General
231Hk49 Manuals, Handbooks, and Policy Statements
231Hk51 k. Particular Cases. Most Cited Cases
(Formerly 255k4 Master and Servant)
Employee had no implied-in-fact employment contract with employer whereby he could be terminated only after certain disciplinary procedures were followed; employee handbook which unequivocally reserved at-will employer status and right to terminate employee at any time with or without cause was issued after alleged representations were made, employee retained employment with employer with full knowledge of modified condition of his employment, and retention of employment constituted acceptance of offer to remain employed at employer as at-will employee.

[21] Contracts 95 ⚿28(3)

95 Contracts
95I Requisites and Validity
95I(B) Parties, Proposals, and Acceptance
95k28 Evidence of Agreement
95k28(3) k. Weight and Sufficiency. Most Cited Cases
Although evidence of oral statements standing alone may establish implied-in-fact contract, such evidence must be sufficient to fulfill requirements of unilateral offer.

[22] Labor and Employment 231H ⚿50

231H Labor and Employment
231HI In General
231Hk49 Manuals, Handbooks, and Policy Statements

231Hk50 k. In General. Most Cited Cases
(Formerly 255k7 Master and Servant)
If employee has knowledge of distributed handbook that changes condition of employee's employment and employee remains in company's employ, modified conditions become part of employee's employment contract.

[23] Labor and Employment 231H ⚿47

231H Labor and Employment
231HI In General
231Hk47 k. Modification or Rescission of Contract. Most Cited Cases
(Formerly 255k7 Master and Servant)
Original employment contract may be modified or replaced by subsequent unilateral contract.

[24] Labor and Employment 231H ⚿47

231H Labor and Employment
231HI In General
231Hk47 k. Modification or Rescission of Contract. Most Cited Cases
(Formerly 255k7 Master and Servant)
Employee's retention of employment after modification or replacement of original employment contract by subsequent unilateral contract constitutes acceptance of offer of unilateral contract; by continuing to stay on job, although free to leave, employment supplies necessary consideration for of- fer.

[25] Labor and Employment 231H ⚿34(2)

231H Labor and Employment
231HI In General
231Hk31 Contracts
231Hk34 Formation; Requisites and Validity
231Hk34(2) k. Particular Cases. Most Cited Cases
(Formerly 255k3(1) Master and Servant)

Labor and Employment 231H ⚿40(3)

231H Labor and Employment
231HI In General
231Hk37 Term, Duration, and Termination
231Hk40 Definite or Indefinite Term; Employment At-Will
231Hk40(3) k. Particular Cases. Most Cited Cases
(Formerly 255k3(1) Master and Servant)
General statements of fairness made to oil company employees through training video were not sufficiently definite to operate as contract provision and were not of such nature that employee could reasonably believe that employer intended to make him offer of employment other than at-will.

[26] Labor and Employment 231H ⚿40(3)

231H Labor and Employment
231HI In General
231Hk37 Term, Duration, and Termination
231Hk40 Definite or Indefinite Term; Employment At-Will
231Hk40(3) k. Particular Cases. Most Cited Cases
(Formerly 255k3(2) Master and Servant)
Simply being informed that other employees could not be terminated without just cause did not necessarily grant same right to employee.

[27] Labor and Employment 231H ⚿47

231H Labor and Employment
231HI In General
231Hk47 k. Modification or Rescission of Contract. Most Cited Cases
(Formerly 255k40(3.1) Master and Servant)
In order to prove that employment status was other than at-will, employee had to point to affirmative and definite acts of employer which demonstrated employer's intent to modify its at-will contract with employee.
***1308** Russell C. Fericks (Argued), Nathan R. Hyde, Gerald J. Lallatin, Richards, Brandt, Miller & Nelson, Salt Lake City, for appellant.

Randall N. Skanchy, Deno G. Himonas (Argued), Jones, Waldo, Holbrook & McDonough, Salt Lake

City, for appellee.

Before BENCH, DAVIS and ORME, JJ.

OPINION

DAVIS, Judge:

Plaintiff Joe D. Trembly appeals the trial court's consideration of defendant Mrs. Fields Cookies's (Mrs. Fields) motion for relief from an earlier denial of Mrs. Fields's motion for summary judgment. The trial court granted the motion and, pursuant to the relief requested, granted summary judgment in favor of Mrs. Fields, concluding that the undisputed facts established as a matter of law that Trembly was an at-will employee of Mrs. Fields. We affirm.

FACTS

Trembly was employed with Mrs. Fields in both staff and managerial positions from November 26, 1986 until his termination on March 13, 1990. When Trembly applied for ***1309** a position with Mrs. Fields, he signed an application for employment, at the top of which was the declaration that "[a]ll employees of [Mrs. Fields] are 'at-will' employees subject to termination at anytime [sic] with or without cause." Immediately above Trembly's signature on the application is the statement "I [Trembly] understand and agree that my employment is for no definite period and may ... be terminated at any time without any previous notice."

Several oral statements were made to Trembly concerning Mrs. Fields's disciplinary and termination policies. During Trembly's initial interview with Mitchell Dorin, Mrs. Fields's Regional Director of Operations, Dorin informed Trembly that he (Trembly) would be allowed "X amount of mistakes" and that certain stages of discipline would be followed before he would be "disciplined" (terminated). Later in Trembly's employment with Mrs. Fields, Cindy Reisner, Mrs. Fields's Director of Personnel, told Trembly that, as district manager, he could not fire anyone at Mrs. Fields without just cause.

In training videos, Randy Fields, Mrs. Fields's Chairman, stated that Mrs. Fields treats its people fairly and that a Mrs. Fields employee "will not be terminated for things unless they've been ... completely investigated fairly." Randy Fields also said that "the values of the company were more important than the training manual and that first and foremost is fair treatment of employees." The training videos were intended for all employees.

During Trembly's tenure at Mrs. Fields, a policy and procedure manual was in place. The policy and procedure manual was replete with references to the at-will nature of each individual's employment status. In November 1989, an Employee Handbook (handbook) was distributed, which, by its terms, superseded all prior handbooks, manuals, policies and procedures issued by Mrs. Fields. The handbook was distributed after the oral statements were made to Trembly by Dorin and Reisner, and after the Randy Fields's video was distributed.

The handbook provides:

This handbook is provided as a guide which you may use to familiarize yourself with [Mrs. Fields]. It is provided and is intended only as a helpful guide. It does not constitute, nor should it be construed to constitute an agreement or contract of employment, express or implied, or as a promise of treatment in any particular manner in any given situation. This handbook states only general [Mrs. Fields's] guidelines.

The handbook's disciplinary process includes the following reservation:
[Mrs. Fields] is an "at-will" employer which means that any and all team members are subject to termination at anytime [sic] with or without cause. Although we generally will follow a disciplinary process because we are an at-will employer,[FN1] [Mrs. Fields] reserves the right to terminate a team mem-

ber immediately.

> FN1. Although this statement arguably represents a misunderstanding of law, we believe the intent of the handbook is clear and that it is likely the comma was inadvertently placed after the word "employer" rather than after the word "process."

The handbook further states that Mrs. Fields will "generally follow[ ] a progressive discipline policy that involves four stages": a verbal discussion, a written statement outlining an employee's required performance, a written statement of consequences if an employee is not performing as required, and an execution of the consequences. The handbook then provides a list of "grounds for immediate termination." Immediately following this list is the declaration that "[Mrs. Fields] is an at-will employer," that the list provided should not be "construed as a promise of specific treatment in a given situation," and that "[Mrs. Fields] is free to terminate an employee's employment at any time with or without cause."

Trembly testified in his deposition that he had used this particular handbook for training a store manager and had specifically talked about the at-will language contained in the handbook. Trembly further testified that he understood that Mrs. Fields utilized an at-will employment policy and believed his ***1310** employment relationship with Mrs. Fields to be "at-will."

Mrs. Fields terminated Trembly on March 13, 1990. Trembly filed suit against Mrs. Fields, asserting five causes of action: (1) breach of implied-in-fact employment contract; (2) breach of written contract; (3) breach of covenant of good faith and fair dealing; (4) misrepresentation; and (5) intentional infliction of emotional distress. Trembly filed his complaint in the Third Judicial District Court in Summit County, which operates on a rotating trial judge calendar.

Mrs. Fields filed a motion to dismiss Trembly's third cause of action, which was granted by then-presiding Judge Frank G. Noel. Mrs. Fields subsequently filed a motion for summary judgment, seeking dismissal of Trembly's remaining causes of action. The trial court, through Judge Homer F. Wilkinson, granted summary judgment on Trembly's fourth and fifth causes of action, but denied summary judgment on Trembly's first and second claims.

Mrs. Fields filed a motion for reconsideration of Judge Wilkinson's denial of summary judgment with respect to Trembly's first and second causes of action. Judge Wilkinson partially granted the motion, dismissing count two of Trembly's complaint, but leaving intact Trembly's implied-in-fact employment contract claim. Mrs. Fields subsequently filed a motion for relief from that order, basing it upon the then recent Utah Supreme Court decisions *Sanderson v. First Sec. Leasing,* 844 P.2d 303 (Utah 1992), and *Hodgson v. Bunzl Utah, Inc.,* 844 P.2d 331 (Utah 1992). Judge David S. Young, who had rotated into the court replacing Judge Wilkinson, granted the motion for relief and rendered summary judgment in Mrs. Fields's favor on the grounds that the holdings in *Sanderson* and *Hodgson* and the undisputed facts established, as a matter of law, that Trembly's "employment relationship with [Mrs. Fields] was 'at-will.' "

Trembly appeals.

ISSUES

This appeal raises three issues: (1) Whether Judge Young erred in entertaining Mrs. Fields's motion for relief; (2) whether Judge Young erred by granting the motion; and (3) whether the undisputed evidence creates a material issue of fact as to whether Trembly had an implied-in-fact employment contract providing he would be terminated only for cause and, accordingly, whether summary judgment was improper.

ANALYSIS

[1][2][3][4] Trembly claims that Judge Young erred in hearing Mrs. Fields's motion [FN2] because no new facts were presented and because entertaining the motion violated the "law of the case" doctrine. The decision to entertain a motion under Rule 54(b) is a question of law. " 'We accord conclusions of law no particular deference, but review them for correctness.' " *Richins v. Delbert Chipman & Sons Co.,* 817 P.2d 382, 385 (Utah App.1991) (quoting *Scharf v. BMG Corp.,* 700 P.2d 1068, 1070 (Utah 1985)).

> FN2. Mrs. Fields brought its motion pursuant to Rule 60(b)(7) of the Utah Rules of Civil Procedure. However, by its terms, Rule 60(b)(7) applies only to motions for relief from a *final* judgment or order. Utah R.Civ.P. 60(b). *But see Rees v. Albertson's, Inc.,* 587 P.2d 130, 131-32 (Utah 1978) (suggesting in dicta that Rule 60(b)(7) is appropriate mechanism to request reconsideration of earlier denial of motion for summary judgment). In this case, Mrs. Fields was asking the court to reconsider the denial of a motion for summary judgment, which is not a final order or judgment. Thus, a motion under Rule 60(b)(7) is not available. Rule 54(b) of the Utah Rules of Civil Procedure, however, allows a court to change its position with respect to any order or decision before a final judgment has been rendered in the case. *See Timm v. Dewsnup,* 851 P.2d 1178, 1184-85 (Utah 1993); *Salt Lake City Corp. v. James Constructors,* 761 P.2d 42, 44-45 (Utah App.1988). Because the substance, not caption, of a motion is dispositive in determining the character of the motion, *see State v. Parker,* 872 P.2d 1041, 1044 (Utah App.1994), we will treat Mrs. Fields's motion as a Rule 54(b) motion.

[5][6] Rule 54(b) of the Utah Rules of Civil Procedure provides, in pertinent part, that

> any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties ... is ***1311** subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Id. Rule 54(b) allows "for the possibility of a judge changing his or her mind in cases involving multiple parties or multiple claims." *Salt Lake City Corp. v. James Constructors,* 761 P.2d 42, 44 (Utah App.1988). Thus, a motion under Rule 54(b) is a proper vehicle to ask the court to reconsider its prior denial of a motion for summary judgment. *Timm v. Dewsnup,* 851 P.2d 1178, 1184-85 (Utah 1993); *James Constructors,* 761 P.2d at 44 & n. 5.

[7] A court can consider several factors in determining the propriety of reconsidering a prior ruling. These may include, but are not limited to, when (1) the matter is presented in a "different light" or under "different circumstances;" (2) there has been a change in the governing law; (3) a party offers new evidence; (4) "manifest injustice" will result if the court does not reconsider the prior ruling; (5) a court needs to correct its own errors; or (6) an issue was inadequately briefed when first contemplated by the court. *State v. O'Neil,* 848 P.2d 694, 697 n. 2 (Utah App.), *cert. denied,* 859 P.2d 585 (Utah 1993).

[8] Mrs. Fields based its motion on *Sanderson v. First Sec. Leasing,* 844 P.2d 303 (Utah 1992), and *Hodgson v. Bunzl Utah, Inc.,* 844 P.2d 331 (Utah 1992), which the supreme court decided *after* Judge Wilkinson denied Mrs. Fields's motion for summary judgment on Trembly's implied-in-fact contract claim. Mrs. Fields apparently believed that these decisions presented the case at bar in a different light because of the factual similarities,[FN3] and because the Utah Supreme Court in *Hodgson* held that the plaintiff had not presented sufficient evidence to withstand summary judgment. Judge Young agreed, stating that "if this were my case and I had handled it throughout, I would have called it back

with the additional cases [*Sanderson* and *Hodgson*] and would have ruled consistent with what I have now done " Judge Young therefore relied on proper grounds for reconsidering the ruling previously made by Judge Wilkinson

> FN3 The plaintiff in *Hodgson* also relied on statements made to her by her supervisor in a preemployment interview and the disciplinary treatment of other employees to support her implied-in-fact contract claim

[9][10][11][12][13][14] Trembly's next contention of error is that the trial court heard Mrs Fields's motion in violation of the "law of the case" doctrine, which provides that "one district court judge cannot overrule another district court judge of equal authority " *Mascaro v Davis,* 741 P 2d 938, 946 (Utah 1987) This doctrine has "evolved to avoid the delays and difficulties that arise when one judge is presented with an issue identical to one which has already been passed upon by a coordinate judge in the same case " *Id* at 947 (footnote omitted) Notwithstanding the law of the case doctrine, " 'a trial court is not inexorably bound by its own precedents ' " *James Constructors,* 761 P 2d at 45 (quotation omitted) "[T]he law of the case doctrine does not prohibit a judge from catching a mistake and fixing it " *Gillmor v Wright,* 850 P 2d 431, 439 (Utah 1993) (Orme, J , concurring) Moreover, a judge is free to change a ruling until a final decision is formally rendered Utah R Civ P 54(b), *Ron Shepherd Ins v Shields,* 882 P 2d 650, 652-54 (Utah 1994), *McKee v Williams,* 741 P 2d 978, 981 (Utah App 1987), *cf Richardson v Grand Central Corp ,* 572 P 2d 395, 397 (Utah 1977) ("[G]enerally preliminary or interim rulings do not rise to the dignity of res judicata or stare decisis ") In this case, the denial of the motion for summary judgment was not a final order Thus, the law of the case doctrine did not preclude Judge Young from revisiting Judge Wilkinson's prior ruling [FN4]

> FN4 The fact that Judge Young replaced Judge Wilkinson is of no significance A single judge is entitled to correct any interim order previously made, and even though a location within a judicial district is on a rotating judge calendar, the authority of the judge who actually decides the case on the merits to correct a previously entered order is undiminished On a rotating calendar, "[i]n a sense, the two judges, while different persons, constitute a single judicial office for law of the case purposes " *Gillmor v Wright,* 850 P 2d 431, 439-40 (Utah 1993) (Orme, J , concurring)

***1312** [15] Because we hold that the trial court did not err in entertaining Mrs Fields's motion, we must next determine whether the trial court properly granted the motion It is within the sound discretion of the trial court to grant a motion under Rule 54(b), and the decision to do so will not be disturbed on appeal absent an abuse of this discretion *State v Smith,* 781 P 2d 879, 882 n 4 (Utah App 1989)

[16] After reviewing the record and the holdings in *Sanderson* and *Hodgson,* we cannot say that Judge Young abused his discretion by granting Mrs Fields's motion for relief Judge Young based his decision on *Sanderson* and *Hodgson,* which were decided *after* Judge Wilkinson denied summary judgment on Trembly's implied-in-fact contract claim *Sanderson* considered issues similar to those raised in the case at bar, the facts in *Hodgson* are analogous to the facts in this case,[FN5] with the Utah Supreme Court holding that the plaintiff's evidence was insufficient to survive summary judgment On this basis, Mrs Fields's motion under Rule 54(b) justified relief, and we decline to reverse Judge Young's decision to grant the motion

> FN5 *See* discussion, footnote 2

[17][18][19] We now address the last issue raised by Trembly whether the trial court erred in granting summary judgment in favor of Mrs Fields "Summary judgment is appropriate only when no genuine issue of material fact exists and the moving

party is entitled to judgment as a matter of law." *Sanderson,* 844 P.2d at 306. Whether summary judgment was appropriate is a question of law and we grant no deference to the trial court's decision, but review it for correctness. *Richins,* 817 P.2d at 385. When reviewing a grant of summary judgment, we liberally construe all inferences that may be reasonably drawn from the facts in favor of the nonmoving party. *Johnson v. Morton Thiokol, Inc.,* 818 P.2d 997, 1000 (Utah 1991). Although the existence of an implied-in-fact employment contract is normally a question of fact left to the discretion of the jury, "the court retains the power to decide whether, as a matter of law, a reasonable jury could find that an implied contract exists." *Sanderson,* 844 P.2d at 306. "If a reasonable jury cannot find that an implied contract exists, summary judgment is appropriate." *Id.* (citations omitted).

[20] Thus, we must determine whether there is a dispute of material fact as to whether Trembly had an implied-in-fact employment contract with Mrs. Fields where Trembly would be terminated only after certain disciplinary procedures were followed. Trembly claims that the verbal assertions made to him and language contained in the company policy and procedures manual created an implied-in-fact employment contract where he could be terminated only after certain disciplinary procedures were followed, even though the subsequent handbook contained disclaimers dismissing any possibility of a contract of employment other than at-will.

[21] In *Johnson,* the supreme court stated that in order for an

implied-in-fact contract term to exist, it must meet the requirements for an offer of a unilateral contract. There must be a manifestation of the employer's intent that is communicated to the employee and sufficiently definite to operate as a contract provision [so that] the employee can reasonably believe that the employer is making an offer of employment other than employment at will.

Johnson, 818 P.2d at 1002 (footnote omitted). While it is clear that evidence of oral statements standing alone may establish an implied-in-fact contract, *Hodgson,* 844 P.2d at 334, such evidence "must be sufficient to fulfill the requirements of a unilateral offer." *Johnson,* 818 P.2d at 1002.

[22][23][24] Trembly claims that the statements made to him by Mitchell Dorin are sufficiently definite to operate as a "contract provision." However, even if we agree with Trembly, if an employee has knowledge of a distributed handbook that changes a condition of the employee's employment, and the employee remains in the company's employ, the modified conditions become part of the employee's employment contract. *Id.; see also* ***1313***Sorenson v. Kennecott-Utah Copper Corp.,* 873 P.2d 1141, 1148 (Utah App.1994) (earlier version of company's code of conduct arguably modifying employee's at-will status was expressly superseded by later version). Further,

"[i]n this manner, an original employment contract may be modified or replaced by a subsequent unilateral contract. The employee's retention of employment constitutes acceptance of the offer of a unilateral contract; by continuing to stay on the job, although free to leave, the employment supplies the necessary consideration for the offer."

Johnson, 818 P.2d at 1002 (quoting *Pine River State Bank v. Mettille,* 333 N.W.2d 622, 627 (Minn.1983)). Thus, even if Dorin's oral assertions to Trembly modified his at-will status with Mrs. Fields, the handbook clearly superseded and replaced that agreement. In the handbook, Mrs. Fields unequivocally reserved its at-will employer status and the right to terminate an employee at any time with or without cause. Trembly testified that he was familiar with this at-will language. Therefore, Trembly could not have reasonably concluded, after distribution of the handbook, that his employment was other than at-will on the basis of Dorin's statements. Mrs. Fields eliminated any confusion regarding employment status by the clear and conspicuous disclaimers contained in the handbook, which was distributed *after* Dorin made his com-

ments to Trembly. Trembly retained his employment with Mrs. Fields with full knowledge of the modified condition of his employment and his retention constituted his acceptance of Mrs. Fields's offer: to remain employed at Mrs. Fields as an at-will employee.

[25] Trembly's reliance on oral statements made by Randy Fields and Cindy Reisner is also misplaced. Trembly claims that Randy Fields's statements to employees in company videos regarding fairness modified Trembly's at-will employment status to one where he could be terminated only for cause. Not only does this argument fail because Trembly saw the video before the handbook was distributed, but also because general statements of fairness made to all company employees through a training video are not sufficiently definite to operate as a contract provision and are not of such a nature that Trembly could reasonably believe that Mrs. Fields intended to make *him* an offer of employment other than at-will. *See Johnson,* 818 P.2d at 1002.

[26][27] Reisner informed Trembly that he could not terminate any Mrs. Fields's employee without just cause and, based on this assertion, Trembly claims his at-will status was modified. As with the statements made by Dorin and Randy Fields, Reisner's disclosure was made before the handbook was distributed and was, therefore, of no consequence to Trembly. Further, simply being informed that other employees could not be terminated without just cause does not necessarily grant the same right to Trembly. *Sorenson,* 873 P.2d at 1148; *accord Kirberg v. West One Bank,* 872 P.2d 39, 42 (Utah App.1994). Trembly is required to "point to affirmative and definite acts of [Mrs. Fields] demonstrating [Mrs. Fields's] intent to modify its at-will contract with [Trembly]." *Kirberg,* 872 P.2d at 42. This he is unable to do.

Lastly, Trembly relies on language in the policy and procedure manual to support his claim that he could be terminated only after Mrs. Fields followed certain disciplinary procedures. However, the policy and procedures manual was superseded by the handbook, which stated "[t]his handbook supersedes all prior handbooks, manuals, policies and procedures issued by the Company." Thus, we reject Trembly's reliance on this manual.

CONCLUSION

Judge Young properly heard Mrs. Fields's motion for relief brought pursuant to Rule 54(b), and did not abuse his discretion in granting that motion. Summary judgment was correct because, as a matter of law, even if Trembly's initial employment contract provided that he would be terminated only after Mrs. Fields followed certain disciplinary procedures, this employment status was later modified by the handbook, which provided that Trembly was an at-will employee. Trembly accepted this contract provision by ***1314** remaining in Mrs. Fields's employ after he had knowledge of the company's at-will employment policy. Accordingly, we affirm.

BENCH and ORME, JJ., concur.

Utah App.,1994.
Trembly v. Mrs. Fields Cookies
884 P.2d 1306

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Tab E

C

Supreme Court of Utah.
FIRST SECURITY BANK OF UTAH, NATIONAL ASSOCIATION, Plaintiff and Respondent,
v.
EZRA C. LUNDAHL, INC., E. Cordell Lundahl et al., Defendants and Appellant.
No. 11359.

May 20, 1969.

Action by bank against depositors to recover for dishonored check. The First District Court, Cache County, Lewis Jones, J., found for bank and depositors appealed. The Supreme Court, Crockett, C.J., held that where jury found that bank had not notified depositors of dishonor of check and that agreement executed by bank and depositors at time of sale of depositors' business to third party constituted accord and satisfaction, trial judge improperly allowed bank to recover on check.

Reversed.

Henriod, J., dissented.

West Headnotes

[1] Banks and Banking 52 ⇐171(5)

52 Banks and Banking
52III Functions and Dealings
52III(D) Collections
52k171 Failure to Collect
52k171(5) k. Duty to Give Notice of Nonacceptance or Nonpayment. Most Cited Cases
Bank which failed to give notice to its depositor of dishonor of check was responsible for resulting loss. U.C.A.1953, §§ 70A-4-104(1) (h), 70A-4-201(1), 70A-4-212, 70A-4-212(1).

[2] Accord and Satisfaction 8 ⇐26(3)

8 Accord and Satisfaction
8k26 Evidence
8k26(3) k. Sufficiency. Most Cited Cases
Evidence sustained finding that settlement agreement which was entered into between bank and depositors at time of closing of sale of depositors' business to third party constituted an accord and satisfaction and discharged depositors from any liability on check which had previously been forwarded by bank to drawee bank for collection.

[3] Trial 388 ⇐362

388 Trial
388IX Verdict
388IX(B) Special Interrogatories and Findings
388k362 k. Amendment or Correction of Findings. Most Cited Cases
Where case is submitted to jury on special verdicts, trial court may make corrections of obvious errors and may make additional findings but may not make findings inconsistent with jury's determination.

[4] Accord and Satisfaction 8 ⇐23

8 Accord and Satisfaction
8k23 k. Operation and Effect of Satisfaction. Most Cited Cases
Where jury found that bank had not notified depositor of dishonor of check and that agreement executed between bank and depositors at time of sale of depositors' business to third party constituted accord and satisfaction, trial judge improperly allowed bank to recover on check.
****887 *433** Walter G. Mann, Reed W. Hadfield, Richard F. Gordon, Brigham City, for appellant.

Chas. P. Olson, of Olson & Hoggan, Logan, Don B. Allen, Salt Lake City, for respondent.

CROCKETT, Chief Justice.

In this suit plaintiff First Security Bank contests

with the defendants, the Lundahls, as to who bears the loss on an $8100 check ***434** which the Lundahls had deposited with the plaintiff bank. The plaintiff sent the check for collection, but it was never paid. The Lundahls asserted two defenses: (1) that because the bank negligently failed to give notice as required by the commercial code, it lost the right to charge it back to defendants' account, and (2) that there was an accord and satisfaction with respect to it.

When the check was dishonored by the payor bank, First Security Bank charged back the check against the defendants' account, obtaining the $893.93 in the account at the time and creating an 'overdraft' of $7206.07. Although a jury answered interrogatories favorable to defendants on the issues of failure to give notice and accord and satisfaction, the trial court, on the basis of 'further findings,' rendered judgment for the plaintiff for $7206.07. Defendants were awarded $893.93 as an offset on their counterclaim. Defendants appeal.

Wherever there is dispute, it is our duty on review to accept as fact that evidence and the reasonable inferences to be drawn therefrom which supports the jury verdict.[FN1]

> FN1. Niemann v. Grand Central Market, Inc., 9 Utah 2d 46, 337 P.2d 424 (1959).

In July, 1966, the corporate defendant, a manufacturer of farm machinery in Logan, Utah, sold several pieces of equipment to Heathfield Equipment, Ltd., of Kamloops, British Columbia. One of the checks received by defendants as payment for the equipment was for $8121.88. This check was deposited in the plaintiff bank on July 28, 1966. It was sent to the Royal Bank of Canada for payment, but it was there dishonored. The check was returned to Logan and the plaintiff bank charged back the amount of the check to the defendants' account. At about this time, however, and for reasons not important here, the check was lost and the Lundahls were required to obtain a second check from Heathfield to replace it.

The second check was received on November 15, 1966, and was deposited with plaintiff bank to Lundahls' account on December 5, 1966. By a letter dated December 9, 1966, the Canadian bank gave notice to First Security of insufficient funds to pay the check, but that it would be held for payment unless otherwise instructed. However, according to the jury's finding, First Security did not then give notice of dishonor to the defendants.

Meanwhile, the Lundahls had been negotiating with a Hesston Corporation to sell their business and had entered into a contract to do so on July 29, 1966. The provisions of interest here are that by December 1, 1966, Hesston would deposit with the plaintiff, in escrow, $187,000 to be held for certain specified dispositions for the benefit of the Lundahls, including the payment of their debts, and that by January 1, 1967, ***435** Lundahls were to 'fully pay, satisfy or obtain release of all debts, wages, accounts, taxes, liabilities' owed by or outstanding against them. It is pertinent to note that plaintiff First Security Bank had a copy of this since it was acting as the escrow agent.

On January 4, 1967, the Lundahls met with representatives of Hesston and plaintiff bank to complete the transaction. At this meeting, defendants were in possession ****888** of a letter from the plaintiff bank setting out all their direct obligations, a total of $75,648.73, and another letter setting out their contingent obligations as $2892.87. But no mention was made in either letter of the $100 check, which the bank knew had not been paid. In accordance with the letters, the Lundahls caused the total of the two amounts shown in the letters, $78,402.55 of the escrow money, to be paid to the bank. Ezra C. Lundahl and E. Cordell Lundahl testified that after this amount was paid they asked for the return of their guaranty, which had been entered into in May, 1964, by the individual defendants for the Lundahl corporation accounts. They testified that the parties agreed that it was to be returned later with other papers.

It was about a month and a half later, by a letter

dated February 16, 1967, that the Royal Bank of Canada returned the $8100 check to the plaintiff bank; and on February 20, 1967, the latter charged that check to the Lundahl account, creating the 'overdraft' therein of $7206.07. The Lundahls questioned the bank's right to do so, and that is the pivotal question in this case.

[1] The plaintiff's contention is that it had accepted the check in question as an agent for collection only, and that it took upon itself no liability as the owner of the check. It is true that under the Uniform Commercial Code there is a presumption that a collecting bank acts as agent for its depositor. Sec. 70A-4-201(1), U.C.A.1953. However, this presupposes that the bank acts in accordance with its duty imposed by law; and this requires presentation to the payor bank in the due course of business, and, if the check is dishonored, notice to its depositor 'by its midnight deadline [FN2] or within a longer reasonable time' under the circumstances. Sec. 70A-4-212(1), U.C.A.1953. If there is a substantial failure of the bank to perform this duty, it loses its right of charge-back. Sec. 70A-4-212, U.C.A.1953. The issue with respect to this duty was found against the plaintiff by the jury's answer to an interrogatory that:

> FN2. The "Midnight deadline' with respect to a bank is midnight on its next banking day following the banking day on which it receives the relevant item or notice or from which the time for taking action commences to run, whichever is later.' Sec. 70A-4-104(1)(h), U.C.A.1953.

We find the Bank was negligent because they failed to notify Lundahls Inc. in the time prescribed by law, or a reasonable*436 time, about the second check not being honored by the Royal Bank of Canada.
This failure of the plaintiff bank to discharge its duty prescribed by the statutes discussed above makes it responsible for the resulting loss. Evidence was presented to the effect that with the passage of time conditions of the Heathfield Company changed substantially, and that if timely notice had been given, there would have been no loss due to its insolvency.

The resolution of the issue on accord and satisfaction by the jury also supports the position of the defendants so plainly that it is hardly susceptible of misunderstanding. Interrogatory No. 4 asked them:

Was there a complete accord and satisfaction between the parties on or about January 4, 1967, whereby all accounts were settled and compromised between the parties, including a promise, if any you find, on the part of the bank to surrender up the written guaranty?

To this the jury answered:

We the jury, agree on the first part of question No. 4. There was complete accord and satisfaction between the parties on January 4, 1967. We find that the guaranty was included in said agreement.

[2] It is the Lundahls' position and testimony that the various amounts to be paid to the bank were discussed, particularly that a reference was made to the $8121.88 obligation, that as a result of their discussion of it, the interest on that item **889 was waived, and that the amounts referred to above, totaling $78,402.55, were to discharge all of their liabilities, direct and contingent, including the obligation in controversy. Even though the evidence may be susceptible of a different conclusion, as plaintiff argues, it is also reasonably supportive of the finding made by the jury that 'all accounts were settled and compromised between the parties.'

The difficulty which exists in this case is that, notwithstanding the findings of the jury in favor of defendants as set forth above, which the trial court stated that he 'accepted,' 'approved' and found 'true and correct,' he nevertheless awarded the plaintiff credit for the amount of the check. This was done on the basis of the court's 'further finding' that the defendants knew or should have known of Heathfield's financial instability and, in

addition, that they were kept fully informed of the plaintiff bank's continuing efforts to collect the check.

[3] The effect of this 'further finding' was actually to contravene the finding made by the jury that the plaintiff bank 'was negligent because it failed to give Lundahls notice in the time prescribed by law, or a reasonable time, about the second ***437** check not being honored by the Royal Bank of Canada.' The same observation is pertinent to the action of the trial court with respect to the issue of accord and satisfaction. Notwithstanding what we have delineated above, the trial court made the 'further finding' that the $8100 check 'was specifically omitted from said settlement * * *.' It is recognized that where a case is submitted to the jury on special verdicts, the trial court may make corrections of obvious errors or defects therein, and he may make additional findings on issues which have not been submitted to the jury, but are necessary to settle the issues involved.[FN3] But when a party has demanded a trial by jury he is entitled to have the jury find the facts, and it is not the trial court's prerogative to make findings inconsistent therewith and thereby defeat the effect of the jury's findings.

FN3. See 53 Am.Jur. Trial s 1094.

[4] In consonance with the jury's answers to the interrogatories and what we have said above, that part of the trial court's judgment allowing the plaintiff bank to charge the $8100 check against the defendants is reversed; and the judgment awarded defendants for $893.93 on their counterclaim is affirmed. Costs to defendants (appellants).

CALLISTER, TUCKETT, and ELLETT, JJ., concur.

HENRIOD, Justice (dissenting).

I respectfully dissent. Although this case is cluttered up with numerous facts, some of a confusing or contradictory character, nonetheless there are a few that are not disputed and which appear to me to be quite simple and decisive, all in harmony with the trial court's judgment.

The only question in this case is whether a check for about $8100 made payable to defendant Lundahl, endorsed and deposited by Lundahl, with a condition imposed by Lundahl that it was for collection only, places an absolute liability on the bank to collect the amount from the maker's bank, in spite of hell and high water, failing which, the bank an obvious agent of Lundahl, becomes, not an agent any more, but an unnamed surety without consideration. All this because of a claim of lack of notice of dishonor under some real or ethereal code provision that apparently has nothing to do with a 'deposit for collection only.' I think that the question should be resolved in favor of the trial court's conclusion that under the facts of this case the bank is not legally liable to contribute its own money for the claimed 'loss' of money, that was not lost at all. Lundahl still has a claim for it against the maker, and if the amount is paid by the latter, whose obligation it is, obviously it would result in an unjust enrichment****890** if plaintiff also paid. The circumstances***438** that Lundahl did not or could not pursue the obligor should be no reason why a mere agent depositee for collection should transmute a primary obligation into a suretyship relationship sans any consensual aspect.

It might be noted that although the main opinion attributes liability to the plaintiff bank because of the check's dishonor by a foreign bank and First Security's failure to give notice thereof,-that conclusion is not quite true under the circumstances of this case. The foreign bank simply notified First Security that there were insufficient funds presently to pay the check but that it would be held for later payment unless otherwise advised. In such case First Security persisted in being Lundahl's agent for collection only, as is reflected in the bank's elimination of interest.

I am unimpressed by the stresses and strains indulged in argument anent the prerogative of the judge as opposed to those of the jury under a rule whose clarity, I would venture, has been unclarified and explained by not one, but many judicial inter-

pretations, as is reflected in the annotations of both the state and federal rule, being 49(a) in both bailiwicks.

The bank should be protected against an unjust enrichment (Restatement, Restitution, Sec. 1, Unjust Enrichment), particularly since there is nothing inimical in the Commercial Code with respect to such protection.

There was no such thing as an accord and satisfaction in this case with respect to the check in question. The check simply was being held by an agent, for the purpose of collection only. Had this agent (the bank) collected on the check, but had not paid the proceeds over, the proceeds then may well have become an item includable in a true accord and satisfaction atmosphere.

The trial court should be affirmed.

Utah 1969.
First Sec. Bank of Utah, Nat. Ass'n v. Ezra C. Lundahl, Inc.
22 Utah 2d 433, 454 P.2d 886, 6 UCC Rep.Serv. 765

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Tab F

604 P.2d 913
(Cite as: 604 P.2d 913)

C

Supreme Court of Utah.
MEL HARDMAN PRODUCTIONS, INC., Plaintiff and Respondent,
v.
Dick ROBINSON and Adanac Film Productions, Ltd., a corp., Defendants and Appellants,
v.
SUNN CLASSIC PICTURES, INC., a corp. and John Does 1 through X, whose true names are unknown, Counterclaim Defendants and Respondents.
No. 16366.

Dec. 7, 1979.

Corporation brought action to recover for breach of defendants' contract to deliver "photoplay" about person known for his association with wild animals. Defendants counterclaimed against corporation's subsidiary on theory that it breached its agreement by failing to pay "residuals" after making movie based on defendants' film and work. The Third District Court, Salt Lake County, Dean E. Conder, J., denied any recovery to corporation on its complaint and granted corporation judgment notwithstanding the verdict on the counterclaim, and defendants appealed. The Supreme Court, Crockett, C. J., held that issue whether corporation or subsidiary had distributed defendants' photoplay, within meaning of the contract, was for jury and was properly submitted to it, and trial court erred in subsequently concluding that defendants could not recover merely because corporation and subsidiary did not use any of the film produced by defendants.

Reversed and remanded.

West Headnotes

[1] Estoppel 156 ⇐52(5)

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k52 Nature and Application of Estoppel in Pais
156k52(5) k. Application in General. Most Cited Cases
It is not consistent with principles of justice and fair dealing for one party to impose on another a requirement that something be done to such party's satisfaction and then permit him to arbitrarily withhold his approval; equity and good conscience require that he act in good faith and prevent him from stubbornly refusing to acknowledge satisfaction without some reasonable justification for doing so.

[2] Copyrights and Intellectual Property 99 ⇐109

99 Copyrights and Intellectual Property
99II Intellectual Property
99k109 k. Remedies. Most Cited Cases
In action in which corporation sought recovery for breach of defendants' contract to deliver "photoplay" and in which defendants counterclaimed against corporation's subsidiary on theory that it breached its agreement by failing to pay "residuals" after making movie based on defendants' film and work, issue whether corporation or subsidiary had distributed defendants' photoplay, within meaning of the contract, was for jury and was properly submitted to it; trial court erred in subsequently concluding that defendants could not recover merely because corporation and subsidiary did not use any of film produced by defendants.

[3] Jury 230 ⇐9

230 Jury
230II Right to Trial by Jury
230k9 k. Nature and Scope in General. Most Cited Cases
Right to trial by jury is one which should be carefully guarded by the courts.

[4] Jury 230 ⇐34(1)

230 Jury

230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k34 Restriction or Invasion of Functions of Jury
230k34(1) k. In General. Most Cited Cases
(Formerly 230k34(2))
Party who has demanded jury trial is entitled to have benefit of jury's findings on issues of fact, and it is not trial court's prerogative to disregard or nullify such findings by making findings of its own.

[5] Appeal and Error 30 ⚿927(7)

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k927 Dismissal, Nonsuit, Demurrer to Evidence, or Direction of Verdict
30k927(7) k. Effect of Evidence and Inferences Therefrom on Direction of Verdict. Most Cited Cases

Appeal and Error 30 ⚿934(1)

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k934 Judgment
30k934(1) k. In General. Most Cited Cases

Judgment 228 ⚿199(3.2)

228 Judgment
228VI On Trial of Issues
228VI(A) Rendition, Form, and Requisites in General
228k199 Notwithstanding Verdict
228k199(3.2) k. Evidence and Inferences That May Be Considered or Drawn. Most Cited Cases

Judgment 228 ⚿199(3.10)

228 Judgment
228VI On Trial of Issues
228VI(A) Rendition, Form, and Requisites in General
228k199 Notwithstanding Verdict
228k199(3.10) k. Where There Is No Evidence to Sustain Verdict. Most Cited Cases

Trial 388 ⚿139.1(7)

388 Trial
388VI Taking Case or Question from Jury
388VI(A) Questions of Law or of Fact in General
388k139.1 Evidence
388k139.1(5) Submission to or Withdrawal from Jury
388k139.1(7) k. "No" Evidence; Total Failure of Proof. Most Cited Cases

Trial 388 ⚿178

388 Trial
388VI Taking Case or Question from Jury
388VI(D) Direction of Verdict
388k178 k. Hearing and Determination. Most Cited Cases
In ruling on motions which would take issues of fact from jury, such as motions for directed verdict and for judgment notwithstanding verdict, trial court must look at the evidence and all reasonable inferences that reasonably may be drawn therefrom in light most favorable to party moved against, and granting of such a motion is justified only if, in so viewing the evidence, there is no substantial basis therein which would support a verdict in his favor; on appeal, in considering trial court's granting of such motions, Supreme Court looks at the evidence in the same manner.

[6] Jury 230 ⚿12(1)

230 Jury
230II Right to Trial by Jury
230k12 Nature of Cause of Action or Issue in General
230k12(1) k. In General. Most Cited Cases

Issue in regard to damages is an issue on which parties are entitled to a jury trial to same extent as on other disputed issues of fact

***914** John S Adams of Gustin, Adams, Kasting & Liapis, Salt Lake City, for defendants and appellants

Peter W Billings and Anthony L Rampton, Salt Lake City, for Mel Hardman Productions

Robert S Howell and Wesley G Howell, Jr , Salt Lake City, for Sunn Classic Pictures

CROCKETT, Chief Justice

Plaintiff Mel Hardman Productions, Inc (hereinafter Productions) sued defendant Dick Robinson and his corporation, Adanac Film Productions, (hereinafter Robinson) for breach of contract for failing to deliver a nature motion picture based on the life of one Grizzly Adams

Robinson denied that allegation and filed a counterclaim against Schick-Sunn Classic Pictures, Inc (hereinafter Pictures), a subsidiary of Productions Robinson alleges that he fully performed the contract, but that after he had delivered his film to Productions, the latter made a movie based upon his idea, his film and his work, which was profitably sold and distributed, and that Productions breached its agreement when it refused to pay him the "residuals" provided for in their agreement

At the close of the evidence after a five-week jury trial, Productions and Pictures moved for directed verdicts The trial court took those motions under advisement and submitted written interrogatories to the jury [FN1] After almost two days of deliberation, the jury returned its answers to the interrogatories They were favorable to Robinson's contentions that he had not committed any material breach of his contract, and that, though he had not completed all of his obligations thereunder, the conduct of Productions constituted a waiver of his failure to do so Similarly, as to the counterclaim, the jury found that Productions or Pictures, its agent, had used and distributed Robinson's photoplay, as that term was used in the contract

FN1 Pursuant to Rule 49(a), U R C P

Both Productions and Pictures then moved for judgment notwithstanding the verdict The court adopted the jury's finding that Robinson had not materially breached the contract and denied Productions any recovery on its complaint However,***915** the court concluded that, since neither Productions nor Pictures distributed any of the actual film which Robinson had produced and delivered to them, he was "not entitled to any residuals or deferred compensation " The court therefore granted the motion for judgment notwithstanding the verdict and ruled that Robinson should also not recover on his counterclaim He appeals

On July 24, 1973, Robinson and Productions entered into a Production Agreement whereby Robinson was to produce a "photoplay" sufficient to produce a feature-length motion picture about one "Grizzly Adams," a historical character who was known for his friendliness and association with wild animals Under the agreement, Robinson was to produce a photoplay "to the sole satisfaction" of Productions "sufficient to produce a motion picture of not less than ninety (90) minutes in duration, filmed on location in the wilds, tentatively entitled 'Grizzly Adams' based on and pursuant to a final story and script to be submitted" by Robinson, and with him playing the main character

As payment therefor, Robinson was to receive $150,000 in four installments, plus a percentage of Productions' gross receipts from the sale, distribution, or other disposition of the photoplay or Productions' rights therein The amount he was to receive was subject to deductions provided for in a distribution agreement between Productions and Pictures, and any costs incurred in the distribution, sale, or other disposition of the photoplay not otherwise to be deducted under that agreement

Robinson began filming in mid-August 1973 and

delivered about 20 hours of film to Productions by October 31, 1973. One month later, after it had paid Robinson the $150,000, Productions hired one John Mahon to assemble a preliminary film from the footage that had been submitted by Robinson. After Productions reviewed the film, they allegedly notified Robinson that the result was not satisfactory; and advanced him another $35,000 to complete the motion picture. The position of plaintiffs is that defendant still failed to deliver a satisfactory motion picture; and in April 1974, this action was initiated for the money it had paid him and for claimed loss of profits because of his alleged breach of the agreement.

On June 10, 1974, Productions employed one Charles Sellier "to salvage the Grizzly Adams project." He reviewed the film that Robinson had submitted and he states that it was his opinion that, due to the deficiencies in the film and Robinson's lack of cooperation, it could not be used; and that he proceeded to produce a different motion picture, entitled "The Life and Times of Grizzly Adams," which contained none of the actual film which had been produced by Robinson. This Sellier version of the story was released in November 1974, and is conceded to be a financial success. It was subsequently distributed to theaters throughout the United States and foreign countries, and shown on television. It was also the basis for a weekly television series which ran for over two years. In July of 1975, Robinson filed his counterclaim for percentages of the proceeds plaintiffs had realized from the distribution of that film. Following extensive discovery procedures and after numerous pre-trial motions and conferences, the case came to trial on January 8, 1979.

The position essayed by Productions and Pictures, both in the trial court and on appeal, is that the intent of the term "photoplay," as used in the agreement, was restricted to the specific motion picture on film (with sound and voice recording) actually produced by Robinson, and to the satisfaction of Productions. Whereas the position taken by the defendant is that the meaning intended was more general, including the aggregate of the name, the general concept of the story, and the literary and work product, which he fashioned into the Grizzly Adams story, all of which he delivered to the plaintiffs and which they made use of.

[1] We note our agreement with the thought that it is simply not consistent with principles of justice and fair dealing for one party to impose upon another a requirement that something be done to his satisfaction and then arbitrarily withhold his approval. Equity and good conscience require***916** that he act in good faith, and prevent him from stubbornly refusing to acknowledge satisfaction without some reasonable justification for doing so. [FN2]

> FN2. Haymore v. Levinson, 8 Utah 2d 66, 328 P.2d 307 (1958).

[2] In the course of the trial, the jury heard and saw all of the evidence relating to those issues. This included the viewing of the Sellier version, which was distributed, and a three-hour edited version of the film which Robinson had produced and delivered to the plaintiffs.

The jury was given proper instructions as to the issues involved and the case was submitted to them on special interrogatories. Instruction No. 18 was:

This case will be submitted to you in the form of a Set of questions to answer Which will resolve the factual issues in this case. After you have resolved the factual questions, the court will determine how your factual determinations apply to the legal issues involved here.

As has been stated above, the jury answered the interrogatories generally favorable to the defendant, and this included this pivotal question:
Did productions or its agent distribute Robinson's photoplay as that term is used in the contract?

to which the jury answered "Yes.

After the jury had returned its answers to the interrogatories, the trial court gave further consideration to the plaintiff's motion for directed verdict and decided to grant it In doing so, he stated

In order for the court to determine whether or not the finding as to the distribution of the "photoplay" can stand the court has to ascertain whether or not the Agreement clearly defines the term Robinson is only entitled to deferred compensation If his photoplay was distributed and box office receipts obtained therefrom

Paragraph 6 of the Agreement is the only one that attempts to define "photoplay" and it says that it "shall be Deemed to include, (emphasis added by the trial court) but not limited to, a motion picture production consisting of 16mm Ektrachrome professional color reversal stock film complete to the post-production stage produced and/or exhibited with or accompanied by sound and voice recording " This court concludes and holds that Since neither Productions nor Pictures ever distributed any of the film produced by Robinson, he is not entitled to any residuals nor deferred compensation

No matter what other parts of the agreement may include items that may be included in the term "photoplay" this definition requires that Part of it must be the celluloid motion picture In so holding this court is fully aware of the rule that this court should accept the jury verdict if there is any evidence to support it (Citing cases)

It will be seen that, in so ruling, the trial court decided to disregard the findings of the jury and to rule in favor of the plaintiff on the issues in dispute as a matter of law It is our opinion that the court erred in concluding that defendant Robinson could not recover merely because plaintiffs did not use any of the actual film produced by him

The agreement provides that the term photoplay "shall be deemed to include, But not limited to, a motion picture production consisting of film complete to the post-production stage " The definition of "photoplay" contained in the contract is an illustrative, but not an all-inclusive one From a consideration of the circumstances surrounding this contract, and the conduct of the parties with respect thereto, it would not be unreasonable to conclude that the term "photoplay" is not necessarily limited to the actual film produced by Robinson

The question as to what was intended by the term "photoplay" and whether Productions or Pictures distributed Robinson's photoplay as that term was intended to mean in the contract, was a question which the trial court had originally considered as a question of fact, and submitted to the jury for determination In that regard, this Court has heretofore stated

***917** It is to be conceded that ordinarily the interpretation of the terms of a document is a question of law for the court, but this is not necessarily true in all situations Where, as here, it is made to appear that the terms may have a particularized application or meaning and there is room for uncertainty or disagreement it was proper for the trial court to regard this dispute as an issue of fact [FN3]

FN3 Universal Invest Co v Carpets, Inc , 16 Utah 2d 336, 400 P 2d 564, 566 (1965) See also Timberline Equip Co v St Paul Fire & Marine Ins Co , 281 Or 639, 576 P 2d 1244 (1977)

There are numerous parts of the record which are consistent with and support the court's initial treatment of the issue as being one of fact In a minute entry dated July 1, 1977, in denying Production's motion for summary judgment against Robinson on his counterclaim, the trial court stated

The court finds that There is ambiguity in the term "Photoplay" in that the definition states it includes, "but is not limited to" the 16mm film This dispute permeates the whole transaction and leaves large issues of fact to be resolved

Similarly, in its pre-trial order of January 3, 1979,

the court stated that one of the issues, both as to the complaint and the counterclaim, was what was the meaning of the term "photoplay" which was to be delivered by Robinson, and further:
(3) Did Productions distribute Robinson's photoplay or any substantial portion thereof Or a substantial similarity thereto.

(Unless otherwise noted, all emphasis herein added.)

It will be seen from the several statements made by the trial court in connection with his rulings that he had consistently considered that the questions: as to the meanings of "photoplay" as used in the contract, whether Robinson had breached the contract, and whether his photoplay had been used and distributed, were questions of fact for the jury.

[3][4][5] As we have numerous times indicated, the right of trial by jury is one which should be carefully safeguarded by the courts, and when a party had demanded such a trial, he is entitled to have the benefit of the jury's findings on issues of fact; and it is not the trial court's prerogative to disregard or nullify them by making findings of his own.[FN4] Therefore, in ruling on motions which take issues of fact from the jury (this includes both motions for directed verdict and for judgment notwithstanding the verdict), the trial court is obliged to look at the evidence and all reasonable inferences that fairly may be drawn therefrom in the light favorable to the party moved against; [FN5] and the granting of such a motion is justified only if, in so viewing the evidence, there is no substantial basis therein which would support a verdict in his favor.[FN6] On appeal, in considering the trial court's granting of such motions, we look at the evidence in the same manner.[FN7]

FN4. Schow v. Guardtone, Inc., 18 Utah 2d 135, 417 P.2d 643 (1966); First Sec. Bank v. Ezra C. Lundahl, Inc., 22 Utah 2d 443, 454 P.2d 886 (1969). See statements in Uptown Appliance & Radio Co. v. Flint, 122 Utah 298, 249 P.2d 826 (1952); Roche v. Zee, 1 Utah 2d 193, 264 P.2d 855 (1953); Flynn v. W. P. Harlin Const. Co., 29 Utah 2d 327, 509 P.2d 356 (1973).

FN5. Koer v. Mayfair Markets, 19 Utah 2d 339, 431 P.2d 566 (1967); Anderson v. Gribble, 30 Utah 2d 68, 513 P.2d 432 (1973); Winters v. W. S. Hatch Co., Inc., Utah, 546 P.2d 603 (1976).

FN6. Holland v. Brown, 15 Utah 2d 422, 394 P.2d 77 (1964); Schow v. Guardtone, Inc., supra, note 4; Koer v. Mayfair Markets, supra, note 5.

FN7. Winters v. W. S. Hatch Co., Inc., supra, note 5; McCloud v. Baum, Utah, 569 P.2d 1125 (1977).

In further accord with what has been said above, and the conclusion we have reached, is the statement the trial court made to counsel after the jury had been discharged: that he thought the jury had examined the case very carefully. Moreover, in his judgment on the special verdict, the court recited that the jury "was most cooperative during the course of the trial and by reason of the questions submitted and requests made of the court during deliberations was one of the most conscientious juries this court has observed."

***918** On the basis of our discussion herein, it is our conclusion that the trial court was correct in his previously expressed views as to the disputed issues; and also that the evidence justified submitting those disputed issues to the jury. Accordingly, the findings of the jury entitling the defendant to recover on his counterclaim should be reinstated.

[6] In view of our conclusion just stated, the question as to damages to be assessed becomes pertinent. On that subject we make these observations: the parties submitted different calculations as to the amounts of damages. When the matter of damages is in dispute, it is an issue upon which the parties are entitled to a jury trial, the same as on other dis-

puted issues of fact. Consistent with what has been said herein, the case is remanded for a determination as to the damages to be awarded on the defendant's counterclaim. Costs to defendant (appellant).

MAUGHAN, WILKINS, HALL and STEWART, JJ., concur.

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